

(1992) 09 P&H CK 0015

High Court Of Punjab And Haryana At Chandigarh**Case No:** Regular Second Appeal No. 1334 of 1991

Onkar Singh

APPELLANT

Vs

Kapur Singh and Others

RESPONDENT

Date of Decision: Sept. 11, 1992**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 91

Citation: (1993) 103 PLR 459**Hon'ble Judges:** Jawahar Lal Gupta, J**Bench:** Single Bench**Advocate:** G.S. Grewal, for the Appellant; Sumeet Mahajan, for the Respondent**Final Decision:** Dismissed

Judgement

Jawahar Lal Gupta, J.

The suit of the plaintiff-respondents having been decreed and the appeal of the appellant having been dismissed by the lower appellate court, they have come up in second appeal in this Court. A few facts may be noticed.

2. The plaintiffs-respondents filed a suit for mandatory injunction against the defendant-appellants for the removal of an encroachment and the construction made by them on a 3-karam wide passage shown in the plan in village Chhokar, Tehsil and District Ludhiana. It was claimed that the 3-karam wide passage abutted on the house of the plaintiff as also those of other residents of the village. It was being used for ingress and egress by the residents of the village. The defendant-appellants had raised construction of a house inspite of the protest made by the plaintiffs and other villagers in June, 1986. On this basis, the prayer for the passing of a decree for mandatory injunction directing the defendants to remove the construction and for permanent injunction restraining the defendants-appellants from raising any construction on the said passage was made. The trial Court framed the following issues :-

1. Whether 3-karam wide site shown in red colour in the plan attached to the plaint, is a common passage ? OPP
2. Whether the plaintiffs are entitled to the injunction prayed! for ? OPP
3. Whether this court has no jurisdiction to try the matter in suit? OPD
4. Whether the suit is not maintainable as alleged ? OPD
5. Whether the suit is bad for non-joinder of necessary parties ? OPD
6. Relief.

After examination of the matter, all the issues were decided in favour of the plaintiff-respondents and the suit was decreed. The appellants filed an appeal before the Addl. District Judge which was dismissed. Aggrieved by the judgments and decrees by the Courts below, the appellants have come up in the present appeal.

3. I have heard Mr. G. S. Grewal for the appellants and Mr. Sumeet Mahajan for the plaintiff respondents. The only point urged by Mr. Grewal is that the plaintiff-respondents had not complied with the provisions of section 91 of the CPC inspite of the fact that they had complained that the appellant had created a public nuisance. The claim made on behalf of the appellant has been controverted by the learned counsel for the respondents.

4. I am unable to accept this plea on two grounds. Firstly, the appellants had not raised any such plea in their written statements before the trial court. It is well-settled that it is the case pleaded which has to be proved. Unless a plea is specifically raised and an issue is framed, it would not be possible for the party concerned to lead suitable evidence and to prove its case. No plea regarding non-compliance with the provision of section 51 of the CPC having been raised, and no issue in this behalf having been framed by the trial court, the appellants cannot be allowed to raise an objection for the first time in this second appeal.

5. Secondly, I am not even satisfied that section 91 causes any impediment in the way of the plaintiff-respondents. The provision reads as under :--

"91. Public nuisances and other wrongful acts affecting the public. - (1) In the case of a public nuisance or other wrongful act affecting, or likely to affect the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the Case, may be instituted;-

(a) by the Advocate-General, or

(b) with the leave of the Court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.

(2) Nothing in this section shall be deemed to limit or otherwise; affect any right of suit which may exist independently of its provision."

A perusal of the above provision shows that in the case of a public nuisance or any other wrongful act affecting or likely to affect the public a suit for declaration and or an injunction or any other appropriate relief can be instituted by the Advocate-General or, with the leave of the Court by two or more persons who, may not have suffered any special damage personally. Section 91 only embodies an enabling provision. It enlarges the locus standi and enables a person who may not be directly affected to approach the Court. It does not a bridge the right of a person who may himself be suffering on account of a nuisance.

6. A perusal of the facts and circumstances of the case shows that the appellants had raised a construction in the public street. It blocked the passage and affected the plaintiffs-respondents directly. Aggrieved by this action they approached the Court. Section 91 cannot be employed to defeat the claim only because they allege that the defendants appellants had caused a public nuisance. As is apparent from a perusal of clause (2) of section 91, the provision does not limit or otherwise affect the right of a person which may exist independently of this provision.

7. Accordingly, there is no merit in this appeal. It is dismissed. In the circumstances of the case, the parties are left to bear their own costs.