**(2016) 10 P&H CK 0165**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** RSA No. 162 of 2009(O&M)

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| Chetan Singh | | APPELLANT |
| | Vs | |
| Nirmal Singh | | RESPONDENT |

**Date of Decision:** Oct. 18, 2016

**Citation:** (2017) 1 ICC 843 : (2016) 4 LawHerald 3314 : (2017) 1 PLJ 405 : (2017) 1 RCRCivil 750

**Hon'ble Judges:** Amol Rattan Singh, J.

**Bench:** Single Bench

**Advocate:** Tarlok Singh Chauhan, Advocate, for the Respondent No. 1; Rakesh Chopra, Advocate, for the Appellant

**Final Decision:** Dismissed

**Judgement**

**Amol Rattan Singh, J.** - This is the second appeal of the first defendant, (now represented by his LRs) in a suit filed by respondent no.1 herein (hereinafter referred as ''plaintiff''), seeking a recovery of Rs. 1,78,000/-. The suit having been decreed in favour of the plaintiff and the first appeal against that judgment and decree having been dismissed by the learned Additional District Judge, Fatehgarh Sahib, this second appeal has been filed.

2. The case set up by the plaintiff was that he is the owner in possession of a house situated in village Nandpur Kalaur as shown in the site plan attached with the plaint, which came to his share in a family settlement with his father and brothers. He stated that he had spent Rs. 1,78,000/- to construct the house and was residing there, with his family. The house was stated to have been evaluated by an "approved draftsman".

On the northern side of the plaintiff''s house, the property of the defendant is stated to be situated. It was alleged that the defendants, knowingly and intentionally, removed soil adjoining the house of the plaintiff, by digging a a pit (khai) in the month of October 1999. After digging the pit, the defendants were stated to have

filled it with water and despite the request of the plaintiff, they did not fill up the pit, due to which the walls, roof and floor of the house of the plaintiff developed cracks and the walls got disjointed at the corner joints. As a result of the cracks, the walls are stated to have sunk, affecting the entire building.

It was further alleged that due to this, the house had become completely dilapidated and unfit for human habitation.

Thus, a recovery of Rs. 1,78,000/- was sought from the two defendants impleaded in the suit, i.e. Chetan Singh (now represented in this appeal through his legal representatives) and one Kaka Khan, who was arrayed as defendant no.2 in the suit.

The suit was filed on 16.11.2000.

3. Upon notice issued to them, the defendants filed a written statement contesting the suit, stating that the plaintiff was not the owner of the land and the house and that he had not spent Rs. 1,78,000/- to construct it. It was further stated that the plaintiff was not living in the house and that the value of Rs. 1,78,000/- had actually not been assessed by an assessed evaluator.

It was also denied that any pit had been dug up and filled with water, with the averment with regard to the walls having developed cracked etc., also wholly being denied.

4. The plaintiff having filed a replication, the following issues were framed by the learned Additional Civil Judge (Sr. Div.), Fatehgarh Sahib:-

1. Whether the plaintiff is entitled to the recovery of Rs. 1,78,000/- as damages?OPP

2. Whether the suit is not maintainable?OPD

3. Relief."

5. The plaintiff examined the draftsman, Sadhu Singh, one Kaka Singh (a member of the village Panchayat), another Amrit Lal Verma, the plaintiff''s father Atma Singh and himself, he also tendered documentary evidence including two site plans, an evaluation report, and photographs with their negatives.

The present appellant-defendant no.1 examined himself and by way of documentary evidence, submitted a copy of a compromise deed dated 08.01.2004, and an application dated 11.12.2012 as Ex.D2.

6. On appraising the aforesaid evidence and the pleadings, the learned Additional Civil Judge found that as per the deposition of the plaintiff''s father, as also of the Member Panchayat, the ownership and possession of the plaintiff, on the basis of a family settlement, stood proved, and in terms of the testimony of the draftsman, PW1, the site plan Ex.P1 and evaluation report, Ex.P2, also stood proved, with the value of the house shown to be Rs. 1,78,000/-. A ''building expert'', Amrit Lal Verma, also deposed as PW3, with regard to the value of the house and proved the site

plan, Ex.P3, prepared by him, wherein the loss was assessed to be Rs. 1,11,000/-.

Cracks in the building were also shown in the aforesaid site plan as was the pit dug up by the defendant.

Further, as per the photographs, Exs.P6 to P15, stated to have been taken under the supervision of the "building expert", PW3, it proved that there was a loss to the plaintiff due to negligence on the part of the defendants, who were found to have dug up the pit and filled it with water, towards the northern side of the property of the plaintiff.

7. Consequently, the suit of the plaintiff was decreed in his favour, holding him entitled to Rs. 1,11,000/- from the defendants.

8. The present appellant-defendant no.1 having filed an appeal before the learned Ist appellate Court, he arrayed the plaintiff as respondent no.1 and his co-defendant Kaka Khan as a proforma respondent.

The learned Additional District Judge, after appraising the evidence and considering the judgment of the learned lower court, first in reference to an argument raised on behalf of the appellant-defendant, held that no easementary right had been claimed by the appellant in his written statement, or even in the grounds of appeal taken by him and as such, the plea that the pit dug up was by way of an easementary right, could not have been taken in arguments, and in any case, no such easementary right could be claimed when such right actually resulted in a tort committed, impinging upon the rights of a neighbour.

Further, in the light of the evidence, the plea that the plaintiff was not the owner of the house was also rejected and that finding of the learned Additional Civil Judge was also upheld.

The learned lower appellate Court also held that though the appellant had denied the ownership of the house by the plaintiff, and had even tried to introduce the name of one Pritam Kaur as the owner of the house in his cross-examination, but eventually, he had admitted that in fact the plaintiff was the owner of the house and in any case, no attempt had been made by him to get Pritam Kaur impleaded as a necessary party.

Further, as regards the compromise deed Ex.D1, (on which no finding is seen to be given by the learned lower court), it was found that the said compromise had been entered into between defendant no.2, Kaka Khan, and the appellant-defendant no.1 on one side, with Kesar Singh, Nirmal Singh and Dharampal Singh on the other side, but the said compromise was in no way connected with the present case because it was with respect to a dispute pertaining to a wall, in respect of an application, Ex.D2, which was subject matter of a dispute between Kesar Singh, Nirmal Singh and Dharampal Singh, in the court of the learned District Judge.

It was found that the appellant had not been able to explain at all as to what the connection of that dispute was, with the property in dispute in the current lis.

Hence, agreeing with the findings of the learned lower court, that it was proved from the testimonies of the witnesses that the building of the plaintiff had developed cracks and had been damaged due to the pit dug up by the appellant and filled with water, the first appeal was also dismissed.

9. Before this Court, Mr. Rakesh Chopra, learned counsel for the appellant, firstly reiterated the pleadings and arguments raised before the courts below, to the effect that the plaintiff had not been proved to be the owner of the suit property, inasmuch as, the specific plea to the said effect had been taken in the written statement by the appellant, which he had duly supported in his cross-examination.

Learned counsel further submitted that wrong khasra numbers had been mentioned in the decree of the learned Civil Judge, upon which the house of the plaintiff stood constructed.

He further submitted that other than the above, the damage assessed was excessive, because the plaintiff himself had stated that he had spent only Rs. 70,000/- and PW2, i.e. Kaka Singh, Member Panchayat, had only stated that he had heard of the damage to the house of the plaintiff.

Learned counsel further cited the judgments cited before the lower appellate Court, on easementary rights of the appellant, i.e. **Panchanan Mondal and another v. Sm. Sulata Roy Mondal, AIR 1980 Calcutta 325.** He further cited another judgment of the Supreme Court in **Gopal Krishnaji Ketkar v. Mohamed Haji Latif and others, AIR 1986 Supreme Court 1413**, to submit that no ownership of the house having been proved by documentary evidence, the plaintiff had no locus standi to institute the suit.

10. In response, Mr. Tarlok Singh Chauhan, learned counsel for the respondent-plaintiff, referred to the findings of the learned Civil Judge as also the learned lower appellate Court, with regard to the ownership of the property, in terms of the testimonies of the witnesses for the plaintiff and submitted that the house being located in a village, there could be no municipal record or even panchayat records with regard to the ownership.

He further submitted that the testimony of the Member Panchayat, as also of the father of the plaintiff, could not be upset by the appellant even in cross-examination and hence, that finding of fact, would not be interfered with by this Court.

11. In rebuttal, learned counsel for the appellant relied upon a judgment of the Andhra Pradesh High Court in **G. Jayaprakash v. The State of Andhra Pradesh and others, AIR 1977 Andhra Pradesh 20**, to submit that a suit would not be maintainable against the appellants as they are the sons of defendant no.1 who had since died, and any tortious act would be only attributable to a specific tort feasor.

12. Having heard learned counsel for the parties and having considered the judgments of the courts below, I find no reason to interfere in concurrent findings of fact, both with regard to the ownership of the respondent-plaintiff which admittedly falls in a village estate and nothing in the testimonies of the witnesses for the plaintiff is shown, by which the ownership of the house cannot be held to be that of the plaintiff. The learned lower appellate court has specifically referred to the cross-examination of the father of the appellants, i.e. defendant no.1 Chetan Singh (husband of appellant no.3), wherein he referred to one Pritam Kaur as the owner of the house. I find no reason to interfere with the finding of that court, that Pritam Kaur not having been sought to be impleaded as a party by the defendant, to show that actually she was the owner of the suit property, the contention of defendant no.1 in that regard, cannot be accepted. It needs also to be noticed here, that other than non-impleadment of the said Pritam Kaur, she was not even examined as a witness by the defendants, to support the oral averment with regard to her alleged ownership of the suit property.

13. Coming to the fact that the house was damaged, again those are two concurrent findings of fact recorded by the courts below, on the basis of evidence, including photographic evidence, the testimonies of two persons referred to as experts, other than the testimonies of the respondent-plaintiff himself. Again nothing has been shown to this Court by which the said finding can be said to be perverse or erroneous in any manner.

14. Coming to the issue of easementary rights; in the judgment in Panchanan Mondal''s case (supra), of a Single Bench of the Calcutta High Court, relied upon by learned counsel for the appellants, it was held in that case, that no immediate damage was caused to the adjacent building by deepening of an already existing ditch, and it was only after the out break of the monsoon, that the ditch filled up water, thereby causing damage.

Hence it was held that no easementary rights had been acquired by the plaintiffs in that case, to support their building or the defendant''s land and that there was no evidence led by the plaintiffs to show that "their land would have subsided even if had been in its natural state and unburdened with their building, by reason of the excavations made by the defendant".

I find no parallel with that case, firstly for the reason that it was never shown on behalf of the appellant in the present case, that the ditch was already existing at the time that the respondent-plaintiff started constructing the building, to rebut the specific stand in the plaint that soil was removed by the defendants knowingly and intentionally, thereby making a pit in which they filled up water, after the building was constructed at a cost of Rs. 1,78,000/-.

Secondly, with due respect, I do not find myself in agreement even with the principle contained in the said judgment, to the effect that deepening of an existing pit would

not amount to impinging upon the right of the owner of an adjacent house, unless of course it was shown that the existing pits were necessary for any specific purpose in the property of the defendant and despite that, the building of the neighbour was erected by him adjacent to the pits.

That being nobody''s case in the present lis, the judgment cited in any case cannot apply.

15. Coming to the issue of no suit lying against the legal heirs of the tort feasor, though on principle learned counsel for the appellant may not be entirely wrong, however, in the present case, the suit was actually filed against defendants Chetan Singh and Kaka Khan, when Chetan Singh was very much alive, and remained so even at the time when the appeal before the Ist appellate court was filed by him.

Both courts having found him negligent and thus having caused damage to the house of the respondent-plaintiff, only because he died thereafter, by the time that this second appeal came to be filed, would not, in the opinion of this Court, absolve the appellants, i.e. his legal heirs, to discharge his liability, duly foisted upon him with two courts having found him responsible for the damage caused to the plaintiff''s house.

16. Consequently, finding no merit in this appeal, it is dismissed, but with the appellants being the legal heirs of the deceased defendant- judgment debtor, no costs are being imposed upon them.