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Ram Babu Vs. Har Prasad

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Court : Allahabad

Decided On : Nov-30-1961

Reported in : AIR1963All239

Judge : S.S. Dhavan, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 100; Easements Act, 1882 - Sections 15

Appeal No. : Second Appeal Nos. 2178 and 2179 of 1952

Appellant : Ram Babu

Respondent : Har Prasad

Advocate for Def. : S.N. Misra and ;S.K. Tewari, Advs.

Advocate for Pet/Ap. : R.C. Ghatak, Adv.

Disposition : Appeals partly allowed

Judgement :

S.S. Dhavan, J.

1. These are two connected second appeals filed by the plaintiff against the decisions of the Civil Judge of Farrukhabad modifying the decree of the trial Court Issuing two injunctions against the defendant. The plaintiff Ram Babu and the

defendant respondent Har Prasad are neighbours in the village Bholey Pur in the district of Farrukhabad. The plaintiff's house has a vacant plot of land towards the east, and the defendant's house adjoins this plot towards the south. The dispute centres round the ownership of this plot and the right to use it. It is common ground that the plaintiff was a co-sharer zamindar of this village. He alleged in his plaint that this plot was his sahan but the defendant, in October 1948, interfered with his enjoyment of this land and committed trespass in various ways. He alleged that the defendant had opened six parnalas on the roof of his house towards the north, a nali or drain discharging water into his Sahara as well as a latrine, and opened a door towards the sahan with the object of passing over the sahan, and had constructed a four-feet wide pushta (or sloping butress) on the sahan along his northern wall for a length of hundred feet. He also alleged that while making these unauthorised constructions the defendant had demolished a cattle trough standing on his sahan, adjoining the wall. The plaintiff complained that all these acts were illegal and asked for the demolition of the pushta, the parnalas, and the nali, and an injunction restraining the defendant from discharging water through the parnalas on the plaintiff's sahan or using it as a passage from his door, and also restraining him from using his latrine. He also sued for damages for the destruction of his cattle trough.

2. The defendant contested the suit and denied the plaintiff's title to the sahan. He also pleaded in the alternative that all his constructions were old and that he had perfected his title to the pushta and the nali by adversepossession. He denied that the latrine had been constructed on the sahan and asserted that it was situate entirely within his own land.

3. The trial Court held that the plaintiff was the owner of the sahan and that the pushta was constructed on the plaintiff's land but he refused the prayer for itsdemolition on the ground that it was constructed more than twelve years before the suit and the defendant hadcompleted his title by adverse possession. He held thatthe nali was old and the plaintiff's suit with regard to it was time-barred. But he held that the parnalas and thedoors towards the north were new and the plaintiff hadno right to discharge water through the parnalas on the plaintiff's sahan nor any right to use the door for entering on the sahan, and issued an injunction

restraining the defendants from using his door for passing over the plaintiff's sahan and further restraining him from discharging water through his parnalas on this sahan. He directed the defendant to close these parnalas within three months. He dismissed the prayer for the possession of the land onwhich the pushta had been constructed and for the demolition of the pushta on which it was constructed as also the prayer for the closing up of the nali. He held that the defendant had not demolished the plaintiff's cattle trough and dismissed the claim for damages. He also held that the latrine had been constructed by the defendant on his own and and refused to issue any injunction restraining him from using it.

4. Both sides appealed against this decision -- the (plaintiff on the ground that his suit should have teen decreed in toto and the defendant on the ground that it should have been dismissed altogether. The learned appellate judge confirmed the finding of the trial Court that 1he sahan in front of the plaintiff's house belonged to him; but he also found that he had not proved the extent of its area or that it extended right up to the defendant's northern wall. He disagreed with the trial Court on the age of the parnalas and held that they were old and the plaintiff had established his right to use them. Heconfirmed the finding that the pushta and the nali were old and that the latrine had been constructed on the defendant's own land. He also confirmed the finding of the trial Court that the door in the defendant's northern waitopening towards the plaintiff's sahan was new but held that the plaintiff had established no case for an injunction to restrain the defendant from using it. Holding that the plaintiff had not established by reliable evidence that his sahan extended right up to the defendant's wall, he dismissed his prayer for relief for the demolition of the pushta and the nali and refused the issue of any injunction forthe closing of the parnalas.

Inconsistently enough, learned Judge also held that the cattle trough which belonged to the plaintiff adjoined the defendant's northern wall and that It had been illegally demolished by the defendant In the process of making hisown constructions. This was the only finding of the learned judge in favour of the plaintiff and he decreed the claim for damages. He dismissed the prayer for an Injunction torestrain the defendant from using his latrine. As a result, he allowed the defendant's appeal, to a considerable extent and dismissed the plaintiff's

appeal except with regard to his suit for damages for the destruction of thecattle trough. The plaintiff has now come to this Court In second appeal against both these judgments. The defendant has filed a cross-objection on the ground that the trial Court should have dismissed even the suit for damages for the destruction of the cattle trough.

5. I have heard Mr. R. C. Ghatak learned counsel for the appellant and Mr. S. K. Tewari, who held the brief of Mr. S. N. Misra, at considerable length. At a later stage of the hearing I also heard Mr. S. N. Misra, himself. The controversy between the parties can be reduced to fairly simple proportions. Both the Courts below have found that the sahan to the east of the plaintiffs' house belongs to him. If the plaintiff can show that it extends right up to the defendant's northern wall, he has established a prima facie case for encroachment on his land unless the defendant can prove a title by adverse possession or a prescriptive right. The learned Judge took the view that the area of the Sahan was undefined and the plaintiff had not discharged the onus of proving that it extended up to the defendant's wall. But at the same time the learned Judge held that the cattle trough belonged to the plaintiff and that it adjoined the defendant's wall. He seemed to have overlooked the fact that this finding is quite inconsistent with the observation that the plaintiff had not proved that his sahan extended up to the defendant's wan. The findings of fact of the lower appellate Court are binding on this Court in a second appeal under Section 100, but if that Court arrives at finding of fact which is correct and then proceeds to make an observation which is Inconsistent with its own finding, the observation is vitiated and not binding on this Court.

The learned Judge's finding that the plaintiff has not discharged the burden of proving that his sahan extends up to the defendant's northern wall is negatived by his own finding that his cattle trough adjoins that very wall. The learned Judge did not realise the clear implications of his own finding. The cattle trough admittedly belongs to the Plaintiff and was constructed somewhere on his sahan. If it was constructed next to the defendant's wall, it follows that his sahan extended to the spot where the trough stood. In Rahmat llahi v. Mohammad Hayat Khan , the Privy Council held that where the Court below misconceives the real question of fact it

had to try there is an error of law on which a second appeal will lie, and also where the lower Court fails to appreciate and determine a vital question of fact to be tried or fails to appreciate a question of fact which vitally affects the issue stated in the case. I think the principle established by the Privy Council can be extended to a case like the one before me where the lower Court fails to appreciate the significance of Its own finding of fact which Is vital for the determination of another finding and the omission results in two Inconsistent and contradictory findings. I am therefore of the opinion, disagreeing with the learned Judge on the basis of his own findings, that the plaintiff has established that the area of his sahan extended up to the defendant's northern wall.

6. The next question is whether the defendant nail the right to commit the acts or exercise rights which he did on this land. As regards the pushta, the concurrent findings of the Courts below are that it was constructed more than twelve years before the suit. This finding Is binding on this Court In second appeal, and it follows that the defendant has perfected by adverse possession his title to the land on which the Pushta is constructed. The plaintiff's suit for the demolition of the pushta must fall.

7. As regards the parnalas, the finding of the appellate Court is that they are old. The word 'old' is vague and does not establish their age. I perused the written statement of the defendants; they alleged that they constructed the parnalas a little more than twelve years before the suit. This would give them no prescriptive right to discharge any water through these parnalas on the sahan which has been held to be the plaintiff's. The plaintiff is, therefore, entitled to relief to prevent the defendant from using these parnalas in violation of his rights. The legal position with regard in the nali is the same. It is common ground between counsel that the nali was constructed un the defendant's land but the water from it is drained into the defendant's (plaintiff's?) sahan. The defendant cannot do this unless he proves a right by prescription. But In his written statement he states that the nali was constructed about 12 years ago. This would give him no easementary right against the plaintiff's sahan, and consequently the plaintiff is entitled to an order preventing the defendant from draining any water from this nali into his land.

8. As regards the door, both the Courts have held that it was recently constructed and opened towards the Plain' tiff's sahan, but the appellate judge held that it would necessarily be used for obtaining access to the plaintiff's land. Mr. S.N. Misra leafned counsel for the defendant-respondent drew my attention to my own decision in a recent case, Mathura Prasad v. Chandrao Pal, S. A. no. 921 of 1954, in which I observed that the opening of a door by the defendant in his own wail raised no presumption that he would use it for the purpose of passing through the plaintiff's land which adjoined the wall. Learned counsel submitted that 1 should follow that decision in this 'case and hold that there is no presumption that the defendant will use his door for committing trespass on the plaintiff's sahan. It is true that I did make the observation referred to by the learned counsel but 1 now teal that it was not a particularly happy one. Mr. Ghatak has pointed out that there is a distinction between a window and a door, and though it may be argued that a window is not ordinarily used for ingress and outgress but only for light and ventilation, a door by its very nature is a means of access to the outside world. I am afraid this simple point was overlooked by me, though.) may observe in extenuation that it was not brought to my notice by counsel.

Mr. Misra appeared in the previous case too, and nodoubt he will take such steps as he may be advised, forthe rectification of the observation made in that caseand of the decision which followed it. But in the presentcase, 1 cannot shut my eyes to the fact that the door hasbeen opened in a wall which adjoins the plaintiff's land,and the defendant's own case In the written statement isthat it has been opened for the purpose of access to thenorth. The plaintiff, therefore, has a reasonable apprehension that the opening of the door is a first step towardssubsequent act of trespass against his land. I think theplaintiff is entitled to relief in these circumstances. TheCourt cannot compel the defendant to close the door but itcan restrain him from using it in a manner detrimental tothe plaintiff's rights.

9. As regards the latrine the plaintiff asked for an injunction to restrain the defendant from using it. The defendant admitted that he was using this latrine but he claimed that the sahan adjoining the latrine belonged to him. This Court has found that the sahan belongs to the plaintiff. The position, therefore, Is that the

defendant has a latrine adjoining the plaintiffs land and has denied 1he plaintiffs title to that land. In these circumstances, the plaintiff could not. be entitled to an injunction restraining the defendants from using the latrine, but I thinkhe is entitled to an order restraining the defendant front discharging the water and filth of this latrine on his land.

10. As regards the decree for damages for the destruction of the cattle trough, the defendant has filed a cross-objection, but no argument was addressed to me against the finding of the Court below. The cross-objection must therefore, fail.

11. I allow these appeals in part and direct the issue of an injunction restraining the defendant from discharging water from his parnalas or from his nali on the defendant's land; a further injunction restraining the defendant from discharging the water or any rubbish or filth from his latrine on the plaintiff's land and a further injunction restraining the defendant from using his door in the northern wall for obtaining access to the plaintiffs land or for passing through the plaintiff's land. The decree for damages for the destruction of the cattle trough is confirmed. The decree dismissing the plaintiff's suit with regard to the pushta is also confirmed. As regards costs, it is common ground that the parties are neighbours, think it will be in the interest of good neighbourly relations that there should be no further bitterness which would be inevitable in the event of execution of decrees for costs. I am, therefore, inclined to direct that the parties should bear their own costs throughout.

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