

Udairam Vs. Lohro

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Court : Rajasthan

Decided On : Feb-23-1987

Reported in : 1987(2)WLN522

Judge : Farooq Hasan, J.

Appeal No. : S.B. Civil Second Appeal No. 83 of 1981

Appellant : Udairam

Respondent : Lohro

Judgement :

Farooq Hasan, J.

1. This second appeal is directed against the judgment and decree dated 17-11-1980 passed by Civil Judge, Bharatpur (first appellate court) where by he confirmed the judgment and decree passed by the Munsif and Judicial Magistrate, Bayana on 2-9-1975.

2. Brief facts giving-rise to this appeal are that the plaintiff respondents riled the suit with these averments that this Khan house covered with Chhappar is adjacent to the land occupied by the defendant-respondent. This land is situated in the northern side of the plaintiff's aforesaid house. It has been further stated in the plaint that the defendant-appellant had constructed a wall shown in red colour in

the site plan (Ex. 1) and thereby obstructed the flow of rain water from his Chhappar towards the land over which the 'Nohra' of the defendant was constructed. The plaintiff-respondent further asserted that the aforesaid right to flow of rainy water from the Chhappar is an old one and thereby he acquired a right of easement over the land possessed and occupied by the defendant appellant. On the basis of aforesaid averments the plaintiff-respondent prayed that whole of the wall shown in red colour in Ex. 1 constructed by the defendant-appellant be demolished and the defendant-appellant be further restrained from obstructing the flow of rainy water from the 'Chhappar.'

3. On the basis of the pleading of the parties necessary issues were framed. After recording the evidence and hearing the parties, the learned trial court decreed the suit of the plaintiff. The defendant-appellant filed the appeal against the aforesaid judgment and decree but without any success. Hence, this second appeal.

4. Heard learned Counsel for the appellant and perused the record. None present on behalf of the defendant-appellant.

5. The learned Counsel for the appellant frankly conceded that the finding with regard to the right of easement acquired by the plaintiff-respondent is a finding of fact and in view of settled principles of law, such a finding cannot be challenged in second appeal. But, at the same time, Mr. Dalip Singh submitted that the wall of the defendant is ordered to be demolished by the sub-ordinate courts on the ground that rainy water of the Chhappar of the plaintiff-respondent falls towards the land of the defendant-respondent is 222 ft. in length and the wall constructed by the defendant appellant which is to be demolished is 30.8 ft. in length. It is thus clear that no right of the plaintiff-respondent either exists or is claimed on the defendant-appellant's land measuring 8.6 ft. in length on the eastern side which is shown as A to B in the site plan (Ex. 1). So, the learned courts below committed error in decreeing the suit for the demolition of wall from A to B. Looking to the aforesaid circumstances of the case, I agree with the contention of the learned Counsel and am of the opinion that there was no reason before the subordinate courts to decree the suit of the plaintiff with regard to the disputed wall from point A to B. In this view of the matter, the suit of the plaintiff respondent with regard to

the wall constructed by the defendant-appellant measuring 8.6ft. in length from point A to B on the eastern side marked in Ex. 1, is liable to be dismissed. Accordingly, the suit of the plaintiff to this extent is dismissed.

6. Learned Counsel for the appellant further submitted that easementary right claimed by the respondent-plaintiff against the defendant-appellant is that the rainy water falls from the 'Chhappar' of the plaintiff-respondent on the land of the defendant-appellant and it is an admitted fact that in between the walls of the parties there is a space of 6' in width and the water can fall in this space. In these circumstances, the wall of the defendant-appellant cannot be demolished. Although this contention of the learned Counsel has some force but if the water falls in the aforesaid space of 6' in width then it is just possible that the water may not come out from this space and it may cause damage to both the houses. So, on this contention, the suit of the plaintiff cannot be dismissed. The third contention of the learned Counsel is that the servient owner is at liberty to use his servient heritage in any manner he chooses after preserving the right of the dominant owner, and the dominant owner cannot restrain the servient owner by claiming the unlimited right. In these circumstance, if a cemented drain on the aforesaid space of 6' in width in between the walls of the parties is constructed below the Chhappar of the plaintiff-respondent then the easementary right of the plaintiff-respondent can be kept in tact. This contention of the learned Counsel has some force. A servient owner is free to use the servient tenement in any way he chooses subject to the restriction that the right of easement of dominant owner is kept in tact and if the rights are kept intact then the dominant owner cannot impose further condition on the servient heritage The dominant owner has no right to restrict the use of the servient heritage except to that extent i.e. right of the easement is protected. If the servient owner makes necessary arrangements for receiving the rainy water and discharging it on the land then in that situation the servient owner is not disentitled to make any construction on the servient tenement. The dominant owner can claim the easementary right with least inconvenience to be caused to the servient owner. I find support for the above observations made in *Ram Narain Chobe v. Ganga Dhar Chobe* : AIR1975 All248 and *Babu Narain I (sic) v. Manohar Lal* : AIR 1973 MP143 .

7. It is an admitted fact that the defendant-appellant has constructed the disputed wall 6' away from the wall of the plaintiff-respondent. In view of the proposition laid down in the cases (supra), I am of the opinion that the rights of easement of the plaintiff respondent shall remain intact, if the defendant-appellant constructs a cemented drain 8' in width one ft. just below the Chhappar of the plaintiff-respondent so that the rainy water flown from the 'Chhappar' of the plaintiff respondent shall be discharged on the western side after flowing through the drain to be constructed by the defendant-appellant. The defendant-appellant is directed to construct the drain within the period of six months failing which the decree of the courts below shall be restored. As per modifications mentioned above, the appeal is, therefore, partly allowed. The suit of the plaintiff-respondent with regard to demolition of the defendant-appellant's wall 8 6ft. in length marked as A to B in the plan (Ex. 1) is dismissed and the rest of the suit of the plaintiff respondent is decreed according to the modification made above. The parties shall bear their own costs.