

Geeta Devi (Smt.) Vs. the Additional District and Sessions Judge No. 5 and ors.

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Court : Rajasthan

Decided On : Aug-12-2009

Reported in : 2009(3)WLN566

Judge : Dalip Singh, J.

Appellant : Geeta Devi (Smt.)

Respondent : The Additional District and Sessions Judge No. 5 and ors.

Judgement :

Dalip Singh, J.

1. Heard learned Counsel for the parties.
2. This is plaintiff's writ petition against the order of the learned Lower Appellate Court dt. 26.10.2005 by which the learned Lower Appellate Court accepted the appeal filed by the defendant and set aside the order passed by the learned trial Court on the application under Order 39 Rule 1 and 2, C.P.C. for grant of temporary injunction and dismissed the said application.
3. Brief facts, relevant for the purpose of this writ petition are that the defendant-respondents wanted to make a passage to the garage in his house bearing No.

1932. The plaintiff is the owner of the house bearing No. 1933. The bone of contention is that in front of both the houses of the plaintiff (1933) and of the defendant-respondent (1932), there is in existence a 'chabutra', which as per the plaintiff is said to be a common one. The defendant wanted to demolish the part of the 'chabutra' in front of his house bearing No. 1932 so as to make a passage for his vehicle etc., to be taken in side his house bearing No. 1932, rather than leaving in parked on the public street unattended in the narrow lane. The plaintiff having contended that 'chabutra' was common, therefore, the defendant would not be permitted to demolish the same.

4. The learned trial Court allowed the temporary injunction application holding the prima-facie case in favour of the plaintiff and restrained the defendant-respondent from causing further demolition of the 'chabutra' and constructing the passage, as the 'chabutra' had already been demolished in front of the defendant's house No. 1932.

5. Being aggrieved by the impugned order of the learned trial Court dt. 21.07.2004 the defendant preferred an appeal.

6. The learned Lower Appellate Court in its judgment dt. 26.10.2005 came to the conclusion that so far as, prima-facie case is concerned, there is a triable issue no doubt, which is to be decided at trial on the basis of the evidence, as in the document of title set-up by the plaintiff-petitioner, there is a mention of the 'chabutra' being common and running in front of the house bearing Nos. 1933 and 1932.

7. On the other hand, the learned Lower Appellate Court observed in Para 6 of the impugned judgment that as per the case of the defendant-respondent and the document of title set-up by him and other evidence placed before the Court by the defendant, the 'chabutra' is in not a common one.

8. Be that as it may, the learned Lower Appellate Court came to the conclusion in Paras 11 and 13 of the impugned judgment that prima-facie the houses bearing No. 1932 and 1933 are two separate units independent of each other. No doubt in front of both these houses there is a running 'chabutra'.

9. The defendant wants to demolish the part of the 'chabutra' in front of his house so as to make a passage for entry and exist to his house No. 1932, which is not possible while the 'chabutra' nearly 3-4 feet in height is in existence. The defendant, therefore, wanted to demolish the part of the 'chabutra' in front of house bearing No. 1932, which belongs to the defendant and created a passage at that part or place of the existing 'chabutra' so that the vehicle etc., may enter into the house and be parked inside his house, rather being left unattended in the public street.

10. Learned Lower Appellate Court, therefore, observed that the aspects of balance of convenience and irreparable loss were in favour of the defendant, rather than of the plaintiff, as the plaintiff would not suffer any material or irreparable loss as in front of his house No. 1933 the 'chabutra' is not being demolished or disturbed and, hence, allowed the appeal filed by the defendant and set aside the order of temporary injunction passed by the learned trial Court on 21.07.2004 and dismissed the application for grant of temporary injunction under Order 39 Rule 1 and 2, C.P.C.

11. Being aggrieved by the aforesaid order, the plaintiff has come up in writ petition before this Court.

12. It is not in dispute and is also evident from the photographs, which were placed before me by the learned Counsel for the plaintiff that part of the 'chabutra' has already been demolished and it is at that stage the plaintiff went to the Court by filing the present suit seeking the relief of injunction.

13. I have heard the learned Counsel for the parties and perused the impugned order.

14. In the matter of grant of temporary injunction, no doubt, prima-facie, case has to be considered by the Courts, but at the same time two other considerations also are equally required to be established namely; the balance of convenience and irreparable loss, as held by this Court in the case of Shayak Mohd. and Ors. v. Iqbal Ahmed reported in : AIR 1973 Raj. 115.

15. The learned Court below while dismissing the application for grant of temporary injunction has take care to protect the right of the plaintiff, inasmuch as the learned Lower Appellate Court has held that it would be open for the plaintiff to construct the stairs in front of his house bearing No. 1933 to enter the same over the 'chabutra' or to come to the public street from inside his house and no inconvenience would be caused to the plaintiff.

16. Learned Counsel for the defendant-respondents very candidly submitted that so far as the defendant is concerned, the defendant would have no objection in case the plaintiff is permitted to raise/construct the stairs for entry and exist to his house No. 1933. Admittedly in front of the main 'poll', which is the entrance to the plaintiffs house there is in existence the alleged common 'chabutra' and if the plaintiff's case is to be accepted the defendant, who is the owner of the house No. 1932 would have the right to sleep or sit on the comon ' chabutra' right in front of the said 'poll' or entrance of the plaintiffs house No. 1933.

17. Thus, I am of the opinion that greater hardship would be caused to the defendant, if the defendant is prevented from constructing the passage by demolition of the 'chabutra' in front of his house bearing No. 1932, at this would provide the safe and comfortable passage to the defendant to enter his house No. 1932 through the said passage and the interest of the plaintiff is also well protected if the plaintiff is permitted to construct the stairs in front of his own house.

18. Thus, the question of balance of connivance and irreparable loss has been weighed by the learned Lower Appellate Court and the inconveniences, if at all to the plaintiff has been well considered and steps to mitigate the aforesaid have been taken into account by permitting the plaintiff to raise the construction of the stairs in front of his own house.

19. It is the case of the defendant that the defendant wants to demolish the 'chabutra' in front of his own house so as to make it possible for the defendant to take his vehicle etc., in side his own house for the purpose of parking the same. There is an element of public interest also involved if the defendant parks his vehicle in side, rather than leaving it on the road and obstructing the public street.

20. In the facts and circumstances of the present case, I am of the opinion that the impugned order passed by the learned Lower Appellate Court dt. 26.10.2005 does not call for any interference in the writ jurisdiction under Articles 226 and 227 of the Constitution of India, as the learned Lower Appellate Court has not committed any error of jurisdiction in allowing the appeal, which the learned Lower Appellate Court had the jurisdiction to decide after considering the material on record.

21. Consequently, the writ petition as well as the stay application are dismissed. It may be made clear that in constructing the passage the defendant shall not demolish any portion of the 'chabutra' beyond the limits of house No. 1932.

22. The interim order passed by this Court dt. 24.11.2005 stands vacated.

23. The learned trial Court would take steps to decide the suit as expeditiously as possible with the cooperation of both the parties.

24. Any observations made by this Court in this order would not influence the learned trial Court in deciding the suit on merits. The suit shall be decided on the basis of the evidence lead by both the parties at trial on the issues involved.

25. This writ petition stands disposed of.