

Prem Devi and ors. Vs. Sohan Lal and ors.

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Court : Rajasthan

Decided On : Mar-09-1988

Reported in : 1988(1)WLN684

Judge : Navin Chandra Sharma, J.

Appeal No. : S.B. Civil Second Appeals Nos. 284 and 315 of 1976 and S.B. Civil Execution Second Appeal No. 2 1977

Appellant : Prem Devi and ors.;sohan Lal and ors.

Respondent : Sohan Lal and ors.;prem Devi and ors.

Judgement :

N.C. Sharma, J.

1. This judgment will decide Civil Second Appeal No. 284 of 1976 filed by the legal representatives or original defendants, Civil Second Appeal No. 315 of 1976 filed by Sohan Lal plaintiff and Civil Execution Second Appeal No. 2 of 1977 filed by the legal representatives of defendants-judgment-debtors together as they arise from the same Civil Original Suit No. 42 of 1967 instituted by Sohanlal plaintiff in the court of the Munsif, Nathdwara.

2. Facts leading to these three second appeals are that on February 13, 1967 Sohan Lal plaintiff instituted Civil Original Suit No. 42 of 1967 against Manohar Lal

defendant (since having died) with the averments that the plaintiff owned and possessed a three-storeyed house situated in Mohalla Nai Haveli in the town of Nathdwara. The agricultural land of defendant Manohar Lal was immediately adjoining the northern wall of the plaintiff's aforesaid house. There were three ancient windows, one 'teer kas' and two spouts in the first storey, four ancient windows and four spouts in the second storey and four ancient windows and five spouts in the third storey in the northern wall of the plaintiff's aforesaid house through which the plaintiff had been peacefully and without interruption enjoying the right of receiving light and air to his house and the right of discharging water on the field of the defendant from his house for quite a long time. It was alleged that the defendant had no legal right to construct a residential house on the agricultural land till it was converted for non agricultural use and without obtaining the requisite permission. Despite that the defendant had just started constructing a house on his agricultural land and immediately adjoining the northern wall of the plaintiff's house which would result in the closure of the windows and spouts in the northern wall and the plaintiff would be deprived of their use for ever. The defendant was asked to construct his house after leaving a space of four to six feet wide but he paid no heed to the plaintiff's request. The plaintiff, therefore, instituted the above suit praying for a decree of permanent injunction restraining the defendant from constructing his house just adjoining the northern wall of the plaintiff's house and in case the defendant wanted to construct a house, he should be required to do so after leaving four to six feet wide space from the said northern wall.

3. Manohar Lal defendant filed a written statement on March 30, 1967 in which he pleaded that the plaintiff had only started constructing his three-storeyed house in the year 1966 and which he had only just completed. It was stated that the defendant and his mother Mst. Lahar Bai had their agricultural land towards the north of the plaintiff's house but its Khatedari tenant was his father Fatehlal. The defendant denied that there were any windows or other openings in the first storey of the plaintiff's house opening towards north. The plaintiff had only kept a small new window and a spout in second storey and another small new window and a spout in the third storey of his house in the year 1966-1967 and he was neither enjoying light and air and nor discharging water therefrom since a long time. The defendant had a right to tether his cattle and to stack firewood, grass and

agricultural produce on his agricultural land and even otherwise only revenue courts could decide the matter even if the defendant did not possess such rights over his agricultural land. The defendant has intended to construct a house on his old five feet high Chabutra in order to tether his cattle and to stack agricultural produce and implements and which would no doubt close the two windows and two spouts of the plaintiff's house through which the plaintiff had acquired no easementary rights. The plaintiff had obtained permission from the Municipality to construct two storeys in his house in the year 1965 only and he started constructing the second storey of his house in 1966 and the third storey in the year 1967 and he has kept the two new windows and two new spouts therein recently. Since the defendant had taken a plea in the written statement that his father Fatehlal and his mother Mst. Lehar Bai were also concerned with the agricultural land, they, along with Tehsildar Nathdwara, were also impleaded as defendants in the suit.

4. The trial court framed four issues in the suit. After trial of the suit, the trial court held that the house which the plaintiff had purchased in July, 1961 from Kajor Nagarchi was in a dilapidated condition and that after purchasing the house, the plaintiff had constructed new house. It was held that when the plaintiff purchased the house from Kajor Nagarchi, there was only an old 'pol' and a room over the 'pol' and rest of the portion of the house had fallen down. Rest of the house had been newly constructed by the plaintiff. In the old room over the old 'pol', there were only one window and one spout opening towards north i.e. towards the agricultural land of the defendants. This old room over the old 'pol' was used by Kajor Nagarchi. Rest of the windows and spouts were only new openings which were left by the plaintiff when he constructed the new house and as such the plaintiff had acquired no easementary rights of light and air or draining the water from them towards north of his house. It was held that the plaintiff had acquired easementary rights only in respect of the old spout in the room over the old 'pol' which he did not disturb while newly constructing the house purchased by him from Kajor Nagarchi. The trial court also held that the plaintiff would sustain injury in case the old window and spout in the northern wall of the old room over the old 'pol' is closed by the defendant by raising a wall while constructing his house. The trial court was of the view that the defendant will have to leave a three feet wide

space just in front of this one old window and one spout and will have to keep this space open from upwards or from western side so that the plaintiff may enjoy his easementary right of light and air and of draining the water from the room over the 'pol'. It was also held by the trial court that the land of the defendants was an agricultural land and no permission had been obtained by them for converting the same for non-agricultural use. In any event, if the defendants, after getting the land converted, would construct a house on their land, they would keep the open space in front of one window and one spout of the room over the 'pol' of the plaintiff's house as aforesaid. The trial court accordingly partly decreed the plaintiff's suit for permanent injunction against the defendants on November 15, 1971. Rest of the suit of the plaintiff was dismissed.

5. Both the plaintiff and defendant Manoharlal respectively filed Civil First Appeals Nos. 67 of 1971 and 1 of 1972 respectively against the decree passed by the Munsif, Nathdwara. The Additional Civil Judge, Udaipur, concurring with the findings of the trial court on all the issues, dismissed both these first appeals on July 21, 1976. It may be stated that Fatehlal defendant No. 2 had died during the pendency of the first appeals and his legal representatives were substituted. Manoharlal and Lehari Bai defendants No. 1 & 3 have also expired. Legal representatives of Manoharlal and Lehari Bai and two of the legal representatives of Fatehlal defendant No. 2 have filed the present Civil Second Appeal No. 284 of 1976 against the decree of the Additional Civil Judge, Udaipur. Sohanlal plaintiff has also filed Civil Second Appeal No. 315 of 1976 against the same decree. So far as Civil Executive Second Appeal No. 2 of 1977 is concerned, it had been filed by Manoharlal defendant (since dead and substituted by his legal representatives) against the order of Additional Civil Judge, Udaipur dated July 21, 1976 dismissing his appeal against the order of the Munsif, Nathdwara passed in Execution Case No. 82 of 1971 directing the defendants to remove the constructions made by them in violation of the decree for permanent injunction passed in Civil Suit No. 42 of 1967 within fifteen days and to comply with the decree and on failure to do so, ordering for sending of the defendant-judgment-debtors to Civil jail for six weeks each.

6. So far as the plaintiff Sohanlal is concerned, he is aggrieved from the decree passed by the courts below for the reason that despite clear findings that the plaintiff had a subsisting right of easement of light and air through the window and the right of easement to discharge water through the spout in the room over the Pol, the courts have not granted adequate relief to the plaintiff. His contention is that closure of the 3 feet wide space directed to be kept by the decree from above by the defendants will stop the light and air coming to the windows and the closure of the said space on its western side will stop flow of water from the spout. It is pleaded that the courts below ought to have restrained the defendants from raising any construction in the three feet wide space on the north of the plaintiff's house. It is also pleaded that the defendants ought to have been directed to leave the space so that the plaintiff may receive the light at the angle of at least 45 degree i.e. a space 6 or 7 feet wide instead of only 3 feet.

7. So far as the defendants, who have filed Civil Second Appeal No. 284 of 1976, are concerned they have contended in the appeal that the plaintiff had neither pleaded nor proved that he or his predecessor-in-title had enjoyed the right of light and air and the right to drain the water through the spout as an easement, openly, peaceably and continuously for a period of twenty years ending within two years next before the filing of the suit and that by the apprehended infringement, he would suffer substantial damage; It is contended that if in a suit for permanent injunction, substantial damage is not pleaded, the plaint does not disclose a cause of action and is to be rejected.

8. In Civil Execution Second Appeal No. 2 of 1977, the contention of the defendants judgment-debtors is that the executing court has misconstrued and mis-interpreted the decree passed in Civil Suit No. 42 of 1967 and that they have, while constructing the house, not violated the decree for permanent injunction in as much as they have left 37 inches space vacant in front of the window and the spout and have also left this space open from its western side and have thus complied with the decree.

9. It may be stated at the very outset that we are concerned in these appeals only with one window and one spout in the northern wall of the room in first floor over

the 'pol' of the plaintiff's house. The plaintiff has not filed Civil Second Appeal No. 315 of 1976 for challenging the dismissal of his suit by the courts below with respect to the other windows and spouts mentioned in his plaint.

10. It would appear from the above narration that both the trial court as well as the first Appellate Court have concurrently found that plaintiff Sohanlal had purchased the house situated in Mohalla Nai Haveli, Nath-dawara from Kajod son of Chen Ram on July 17, 1961 under the sale-deed Ex. A-3. The house, when purchased, was in a dilapidated condition. A recital to that effect has clearly been made by Kajod in the sale-deed Ex. A-3. It is mentioned in Ex. A-3 that the western side of this house had fallen down and the walls on the northern and southern sides had also partly fallen down. On northern side there was a 'Kotadi' covered by Rajnagar stones. On the eastern side there was a Pol and the main gate of the house. Over the Pol there was a 'chhapara' covered by Kelu. There were escheat proceedings relating to this house and Thikana Nathdwara had taken over its possession. Kajod put forward his claim during escheat proceedings and the case was decided in his favour in Samvat 2002. Mst. Bhoori wife of Radmal had also initiated a litigation in respect of this house against Kajod, Mst. Gheesi widow of Bhera Nagarchi and Thikana Nathdwara. The suit filed by Mst. Gheesi was dismissed in the year 1951. Kajod sold this house to the plaintiff Sohanlal because the house was in a dilapidated condition and he had no means to reconstruct a house. All these facts are mentioned in the sale-deed Ex. A-3. Admittedly, this house was re-constructed by plaintiff Sohanlal after purchasing it from Kajod in the year 1966 or so as would appear from the two Municipal permissions obtained by Sohanlal on December 4, 1963 and October 27, 1956. Both the courts below have found that even according to the plaintiff he kept the Pol and the upper portion of the Pol in the same condition and rest of the house was newly re-constructed by him. The plaintiff opened new windows and spouts in 3rd storey. Clearly, therefore, the plaintiff was utterly false in the case set up by him in para 2 of the plaint that three windows, one 'teer-kas' and two spouts in first storey, four windows and four spouts in second storey and four windows and five spouts in 3rd storey facing north were existing since quite a long time and that light and air were received by him to his house through these windows and that water was discharged through the spouts since a long time. Both the courts below have held

that only the window in the room over the Pol and a spout there-in opening towards north were old. The decree for permanent injunction was granted only with respect to the window and spout in the room over the Pol. Even if this court may be inclined to take a different view so far as the window in the room over the Poli is concerned, on the basis of the evidence on record, since it is a concurrent finding of fact, this Court will not disturb the finding. However, it is settled law that the plaintiff whose right of easement of light and air disturbed, he can get a decree for perpetual injunction only if he is able to prove that substantial damage would be suffered by him if the window is allowed to be closed. It is necessary for the plaintiff to show that the construction by the defendant has caused substantial damage to the air and light which he was receiving in his room. This proposition of law is settled by a series of decisions of this Court. Reference in this connection may be made to the decisions in *Jamnadas v. Gulraj* ILR (495) 1 Raj. 448, *Mst. Dakhan Bai v. Dhanraj* ILR (1959) 9 Raj 161, *Mst. Umrao Kanwar v. Mst Rampyari* ILR (1959) 9 Raj. 602, *Manoharlal v. Bherulal* ILR 1972 Raj. 31.

11. In the instant case, Sohanlal plaintiff has not deposed a single sentence in his statement that substantial damage would be caused to him by closing of the window in the room over the Pol within the meaning of Section 33 (Explanations 2 and 3) of the Indian Easement Act, 1882. So also the other witnesses examined on behalf of the plaintiff have not at all deposed that any substantial damage would be caused by closing of this window. Mere slight reduction in the quantity of light and air to the dominant tenements cannot by itself be deemed to have caused substantial injury to the plaintiff nor does it create any presumption of special damage. Shivilal PW 2, examined on behalf of the plaintiff, has admitted in his cross-examination that in the hall over the Poli there are two 'gokhadas' towards the eastern and southern wall of the hall over the Poli. The 'gokhada' on the eastern side has three windows about 3-1/2' X 1-1/2'. Similarly the 'gokhada' on the southern side has three windows of the same size. The entrance gate of this hall is on the western side. These windows are obviously more than sufficient to give adequate light and air to the plaintiff's room or hall over the Poli. In the presence of six other windows as stated above and in the absence of any evidence from the side of the plaintiff that he would suffer substantial damage owing to the closure of the small window on the northern side, no perpetual

injunction could lawfully be granted by the courts below against the defendants regarding the window.

12. Then remains the case about one spout in the room over the Police opening towards north. Admittedly, there was only agricultural field of the defendants on the north of the plaintiff's house. The existence of spout in the Kelu-posh room over the Poli has been found to be established by the plaintiff's evidence by both the courts. Hiralal, brother of Kajod, had lived in this house including in the room over the Poli so also Shrilal PW 2 lived as a tenant since about the year 1964. It is also in evidence that 'dhal' of the room over the Police is towards the north. One spout in the room over the police is the only means of discharge of domestic water towards north. Even a tenement, which is vacant and unoccupied, can acquire easement rights over the servient tenement. There appears to be no authority in support of the argument that the property in respect of which right of easement of draining water through the spout is claimed should have remained actually occupied during the entire period of 20 years before the suit. Right to discharge water from spout over the servient tenement is an easement. All that is required is animus of enjoying the right. The trial court had also inspected the site and had found that on the north-western corner of the room over the Poli there was a spout opening towards north. This spout was made of old projecting stone. The other spouts recently opened by the plaintiff in his house had drainage through cement pipe. This fact is also apparent from the photo marked Ex. 1, where the old spout of old stone is at place marked 'C' in the photo. It was therefore, rightly held that the plaintiff had easementary right to discharge water through the spout opening towards north in the room over the Poli and that it was an old spout. The plaintiffs are entitled to the grant of a permanent injunction against the defendants-respondents to the effect that they would provide a channel 1' wide in the house constructed by them adjoining this spout so as to ensure the free flow of water discharge from this spout from the plaintiffs house and the decree of the trial court will be modified accordingly. Civil Second Appeal No. 284 of 1976 filed by the legal representatives of Manoharlal defendant is thus only partly allowed.

13. In view of my finding that the plaintiff Sohanlal has failed to establish that any substantial damage is caused to him by the closure of the window facing north in

the room over the Poli the Civil Second Appeal No. 315 of 1976 filed by him deserves to be dismissed.

14. In view of the dismissal of the Civil 2nd Appeal No. 315/76 filed by Sohan Lal plaintiff and in view of the dismissal of the plaintiff's suit with regard to the window by partly allowing of Civil Second Appeal No. 284 of 1976 filed by the legal representatives of Manoharlal defendant Civil Execution Second Appeal No. No.2 of 1977 filed the legal representatives of Manoharlal defendant-judgment-debtor deserves to be allowed and the order of the Additional Civil Judge Udaipur dated July 21, 1976 confirming the order passed by the Munsif Nathdwara on March 22, 1974 under O.XXI, Rule 32, CPC deserves to be set aside.

13. Consequently, I partly allow Civil Second Appeal No. 284 of 1976 filed by the legal representatives of Manoharlal defendant and decree the suit of the respondent No. 1 Sohanlal only to this extent that the defendants Nos. 2 and 3 are, by a decree for permanent injunction, directed to provide a Channel 1' wide adjoining the spout the room of the plaintiff over the Poli, of his suit house opening towards north in the house constructed by them for the free flow and discharge of domestic water through the spout within 3 months of the date of this judgment and they are further restrained by perpetual injunction from interfering in the free flow of the domestic water discharged by the plaintiff through the said spout and through the channel to be provided. The decree of the courts below so far as it has directed that the defendants will make construction of their house after leaving 3' wide space opposite the window and would keep it open either from the upper side or western side is set aside and the plaintiff's suit in relation to the window is dismissed. S.B. Civil Second Appeal No. 315 of 1976 filed by plaintiff Sohanlal is dismissed. S.B. Civil Execution Second Appeal No. 2 of 1977 filed by the legal representative of Manoharlal defendant-judgment-debtor is allowed and the order of the Additional Civil Judge, Udaipur dated July 21, 1976 dismissing Civil Miscellaneous Appeal No. 1 of 1974 filed by Manoharlal and Smt Lehari Bai and confirming the order of the Munsif, Nathdwara in Civil Miscellaneous Case No. 82 of 1971 dated March 22, 1974 is set aside. The plaintiff would be at liberty to apply for execution of the decree which has been passed by this Court by this judgment in Civil Second Appeal No. 284 of 1976 in case the defendants failed to comply

with the decree within the period allowed to them by this judgment in the said second appeal. In the circumstances of the case, the parties will bear their own costs in all the three appeals.

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