Kirpa and ors. Vs. Deviditta and ors.

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Court : Himachal Pradesh

Decided On : Sep-20-1952

Reported in : AIR1953HP23

Judge : Chowdhry, J.C.

Acts : Code of Civil Procedure (CPC) , 1908 - Section 115 - Order 41, Rule 31; ; Easements Act, 1882 - Section 13

Appeal No. : Civil Revn. No. 28 of 1952

Appellant : Kirpa and ors.

Respondent : Deviditta and ors.

Advocate for Def. : Ved Vyas Mahajan, Adv.

Advocate for Pet/Ap. : Des Raj Mahajan, Adv.

Disposition : Revision allowed

Judgement :

Chowdhry, J.C.

1. This is a defendants' application in revision against the judgment and decree of the learned District Judge of Chamba, dated 18-1-1952 whereby, allowing the plaintiffs' appeal and setting aside the judgment and decree of the Subordinate

Judge of Chamba, dated 29-9-1951, he partially decreed the suit of the plaintiffs-respondents.

2. The houses of the parties are close to each other and are separated only by a lane. It is common ground that a partition has already taken place between them and each party has been allotted his moiety share. Adjacent to the house of the defendants and to the south of it lies a plot of land 2 marlas in area. The dispute in the present case relates to a portion of the said plot of land nearest to the house of the defendants. The defendants started certain constructions on this area and the plaintiffs filed the present suit for the demolition of the constructions and for an injunction perpetually to restrain the defendants from building on that area. The suit was based on two grounds: (1) that the area in dispute belongs to the plaintiffs as it had been allotted to them in the said partition, and (2) that the strip of the land in suit served as a passage for approach to the plaintiffs' thrashing-floor for plaintiffs themselves and his cattle which had been totally obstructed. The defendants denied the title of the plaintiffs and set up their own title, their contention being that the strip of land in suit had been allotted to them in partition, and they also denied that the disputed land in question was in any way in the use and occupation of the plaintiffs.

3. The trial Court held against the plaintiffs on both the points, the findings being that there was no evidence that the defendants had encroached upon any land belonging to the plaintiffs but it appeared on the contrary that the defendants had made the constructions on old foundations within the line of demarcation between the respective areas of the parties and that a strip of land one karam in area had been left beyond the area in suit for the plaintiffs' passage. In the result, the trial Court dismissed the suit of the plaintiffs. The learned District Judge on plaintiffs' appeal recorded certain findings, to which I shall refer presently, and allowing the appeal decreed the suit of the pltfs. restraining the defts. from making any further constructions on the land in suit although the defendants were permitted to maintain the constructions which they had already made.

4. There was a preliminary objection raised by the learned counsel for the plaintiffs-respondents that this Court is not authorised in exercise of its revisional

jurisdiction to interfere with the appellate judgment of the District Judge, and in support of this contention he relied upon the ruling of their Lordships of the Privy Council reported as -- 'Venkatagiri Ayyangar v. Hindu Religious Endowments Board, Madras', AIR 1949 PC 156, and of a decision of the Allahabad High Court reported as' -- 'Surya Pal Singh v. Chiranji', AIR 1944 All 170 (FB). The latter ruling only incidentally, and therefore very briefly, dealt with the question of interference in exercise of revisional jurisdiction, but the matter was the main subject of decision in the said ruling of their Lordships of the Privy Council. It was laid down by their Lordships as follows:

'Section 115 applies only to cases in which no appeal lies, and where the Legislature has provided no right of appeal, the manifest intention is that the order of the trial Court, right or wrong, shall be final. The section empowers the High Court to satisfy itself upon three matters: (a) That the order of the subordinate Court is within its jurisdiction; (b) that the case is one in which the Court ought to exercise jurisdiction; and (c) that in exercising jurisdiction the Court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. If the High Court is satisfied upon those three matters, it has no power to interfere because it differs, however profoundly, from the conclusions of the subordinate Court upon questions of fact or law. There can be no justification whatsoever for the view that Section 115 (c) was intended to authorise the High Court to interfere and correct gross and palpable errors of Subordinate Courts. It would indeed be difficult to formulate any standard by which the degree of error of subordinate Courts could be measured.

Where the High Court interfered on the ground that the subordinate Court had made a serious mistake in the construction of a will: Held that the order of the High Court was without jurisdiction and must be set aside.'

5. If it were a case of mere wrong decision, this Court would certainly not be authorised to interfere with the decision in exercise of its revisional jurisdiction however gross or palpable might be the error committed by the Court below, but the decision of the lower appellate Court was no judgment at all as required by the

law. On the question of title the only relevant passage appearing in the judgment is the following:

'These witnesses (meaning the plaintiffs' witnesses) have further deposed that the disputed area has all along been in possession of the plaintiffs, and according to Ghangho P. W. 1 the same had fallen to the share of the plaintiffs on partition.'

The plaintiffs' witnesses were, however, not the only witnesses who deposed with regard to possession, for the defendants' witnesses also made statements supporting defendants' possession on the land in suit. The District Judge did not, however, make any reference whatsoever to the statements of the defendants' witnesses. And even as regards the plaintiff's' witnesses, he only stated what they had deposed without stating what his own inference or finding was. There is thus no finding of the District Judge on the question of title. Indeed, from the fact that the defendants have been allowed to retain the constructions already made by them on the and in suit it would appear that the finding of the District Judge with regard to title of the land in suit was in favour of the defendants.

6. As regards the other ground on which the 'plaintiff's claimed the said reliefs, i.e., the alleged right of passage over the land in suit, the only reason for which he has granted the said relief to the plaintiffs-respondents is that if the defendants were allowed to raise the height of the present constructions the passage would be totally blocked. He has, however, recorded no finding on whether the plaintiffs did possess any such right of way in the land in suit. In other words, he has presumed that such a right existed in favour of the plaintiffs without assigning any reasons for making the presumption. It may be stated here in passing that even the finding that the passage would be totally blocked is not warranted by the evidence on the record, for according to the two most important witnesses of the plaintiffs-respondents themselves, Karam Singh Patwari and Sridhar Kanungo, only half the open space which served as a passage, i.e., the half nearest to the house of the defendants, would be covered by the constructions of the defendants-petitioners but the other half to the south of the area covered by the defendants' constructions would still be left. The maps prepared by these witnesses also point to the same conclusion. . It is manifest therefore that the lower appellate Court has granted the

aforesaid reliefs to the plaintiffs-respondents without recording any finding on either of the two points of title and right of way on which alone the entire case of the plaintiffs was based. That being so, that Court neither stated the points for determination, nor the decision thereon, nor the reasons for the decision, as required by Order 41, Rule 31, C. P. C. and, therefore, that Court's decision was no judgment as required by the law. It follows, therefore, that the lower appellate Court has, in the words of their Lordships of the Privy Council in the aforesaid ruling, committed an error of procedure which was material in that it had affected the ultimate decision. On the authority cited by the learned counsel for the plaintiffs-respondents themselves, therefore, this is a fit case wherein the decision of the lower appellate Court must be set aside by this Court in exercise of its revisional jurisdiction.

7. I have already stated the two grounds on which the plaintiffs-respondents based their right to the aforesaid reliefs of mandatory and prohibitory injunctions. I have also shown that the lower appellate Court's judgment on those points was no judgment at all in the eye of ,law. Thus we are left with the judgment of the trial Court, and on a perusal of that judgment I find that the suit of the plaintiffs-respondents was dismissed by that Court for good reasons. There were only two witnesses produced by the plaintiffs-respondents with regard to partition, Ghangho P. W. 1 and Chuhroo P. W. 3. The latter admitted his ignorance, as to what respective areas were allotted to the parties in the partition. The former has, no doubt, stated that the area in suit was allotted to the plaintiffs, but a perusal of his entire statement shows that he was a witness hostile to the defendants and therefore unworthy of credence. The trial Court was therefore perfectly justified in holding that the plaintiff's had failed to prove that the area encroached upon belonged to them.

8. As regards the alleged right of way,evidently it has been claimed as an easementof necessity. But, as already shown, the passage has not been blocked but only curtailed.In fact, the constructions have been made ononly half the area and the other half has beenleft open. As held in -- 'Sheo Nath v. Mughla', 40 Punj LR 787,

'An easement of necessity is not to be granted merely on the ground of convenience and advantage, but solely on the ground of absolute necessity. When there are other ways of ingress and exit, an easement of necessity cannot be claimed merely on the ground that such ways are inconvenient.'

The plaintiffs-respondents were, therefore, not entitled to the reliefs claimed on this alternative ground either.

9. In the result, therefore, the revision isallowed, the judgment and decree of the lowerappellate Court are set aside and the judgmentand decree of the trial Court dismissing the suitof the plaintiffs-respondents are restored. Theplaintiffs will bear the costs of the defendantsin this Court and in the Court of the DistrictJudge, but the order of the trial Court as to thecosts in that Court will remain intact.