

Ramesh Chandra and anr. Vs. Ram Rakshpal

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Court : Allahabad

Decided On : Feb-09-1979

Reported in : AIR1979All339

Judge : P.N. Goel, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 100, 100A and 101

Appeal No. : Second Appeal No. 168 of 1969

Appellant : Ramesh Chandra and anr.

Respondent : Ram Rakshpal

Advocate for Def. : Kumar Tiwari and ;J.N. Misra, Advs.

Advocate for Pet/Ap. : Rishi Ram and ;Girdhar Malviya, Advs.

Disposition : Appeal allowed

Judgement :

P.N. Goel, J.

1. This is a defendants appeal against the judgment and decree dated 3-12-1968 passed by the Civil Judge, Bijnor reversing the judgment and decree dated 23-11-1967 passed by Munsif, Nagina, in Original Suit No. 551 of 1966.

2. Parties have their shops in mohalla Kalluganj in the town of Najibabad. Their shops adjoin each other. The shop of the plaintiff-respondent is towards north and the shop of the appellants is just to its south. Both the shops face towards west. A wall 9' in width is between the two shops. The shop of the respondent is a double storeyed one. On the third storey of the respondent's shop there is a wall. The assertion of the respondent was that the intervening wall on the first floor as well as on the second and third floors belonged to him exclusively. The appellants pulled down their shop and in its place constructed a new shop. In doing so they constructed an almirah towards their side in the disputed wall on the ground floor and placed a beam. They also rested their lintel on the said wall. On the third storey/ floor the defendants raised a wall and then placed a lintel. On these allegations the respondent claimed injunction.

3. Defence of the appellants was that it was a joint wall of the parties and that they had raised constructions only on half of the wall on their side.

4. The plaintiff-respondent filed two partition deeds -- one dated 10-8-1946 Ex. 1 and another dated 14-5-1949 Ex. 2. These partition deeds relate to the family of the plaintiff-respondent. The respondent also filed a will Ex. 3 which was executed in favour of Smt. Nirmala Devi, appellant No. 2, wife of appellant No. 1. The parties examined some witnesses in the case.

5. The suit was filed on 5-10-1965 just after the filing of the suit, the respondent got a commission issued to Sri Virendra Kumar, Vakil. The Commissioner inspected the spot on 7-10-1956 and then submitted his report 15 C along with a map. The learned Munsif also inspected the site and recorded an inspection note dated 16-10-1957 56 16-10-1957 56 C.

6. On an appraisal of the entire material before him, the learned Munsif found that the wall on the ground floor was joint of the parties, that the wall on the second and third floors (stories) was constructed by the plaintiff-respondent on joint wall and the defendants-appellants had made constructions on these two stories on the wall constructed by the plaintiff-respondent. On these findings he did not consider reasonable to grant injunction to the plaintiff-respondent. As the appellants had made constructions on the second and third stories on the wall of the plaintiff-respondent, he allowed Rs. 200/- as compensation to the respondent.

7. Against this decree, the plaintiff-respondent filed appeal and the defendants-appellants filed cross-objection before the District Judge. These were heard by the Civil Judge. The Civil Judge dismissed the cross-objection and allowed the appeal filed by the plaintiff-respondent and decreed the suit for injunction.

8. The learned counsel for the appellants contended that as the learned civil Judge did not place reliance on the oral and documentary evidence led in the case, he was not justified in reversing the decree of the trial court simply on the circumstance that on the second and third stories the plaintiff had built wall on the southern half of the wall leaving 4 1/2' width towards north i.e. towards his side.

9. The Civil Judge observed: 'It is an accepted principle of law that an intervening wall is generally joint of the parties unless contrary is established but in this case the position is a little different.' He has then referred to the contentions made in the written statement. Then he observed: 'In order to establish the ownership of the wall exclusively the plaintiff has relied on the partition deeds which contain admission of the plaintiff and not of the defendant and so they are not of much help even if the deed in favour of the defendants does not recite about the ownership in the wall. The oral evidence of the plaintiff consisting of the depositions of Ram Rakshpal, Chunni Lal and Bhagwan Swarup also do not give much assistance in order to set at rest the controversy arising out between the parties. Likewise the oral evidence of the defendants consisting of the depositions of Andul Aziz, Abdul Latif, Ashok Kumar, Khajan Singh, Ram Saran and Ramesh Chand also cannot be availed of and I have only to stick to the circumstances covering the case'.

10. It is evident from the above that the learned Civil Judge did not find the oral and documentary evidence in the case helpful for the determination of the point involved. He proposed to decide the appeal/case on the circumstances. At this stage it shall not be out of place to mention that the trial court recorded finding to the effect that the wall in question on the ground floor was joint on certain pieces of evidence appearing on the record. These pieces of evidence are; (1) The shop of the plaintiff-respondent is

in occupation of Chunni Lal as tenant. Chunni Lal stated that there was only one Parnala of the two shops in dispute and that the said Parnala flowed on the asar of the wall in suit: (2) The shops in suit were inspected by the Commissioner Sri Virendra Kumar just two days after the filing of the suit. Later on the shops were inspected by the learned Munsif in Oct. 1967. The Commissioner found a Niche in the wall in the ground floor towards the side of the appellants' shop. The learned Munsif also found signs of the closing of a Niche. It means that there was a Niche in the disputed wall in the ground floor towards the side of the appellant's shop.

11. The learned Civil Judge did not take into consideration these two facts. The learned Civil Judge based his judgment only on one circumstance, namely, the wall on the second and third stories was built on the southern half width of the wall by the plaintiff-respondent leaving half of the wall towards the respondent's shop.

12. The learned counsel for the appellants contended that the Civil Judge was not correct in observing that the wall on the second and third stories was built on the southern half width of the disputed wall by the plaintiff-respondent and that record does not bear out this observation. The Civil Judge inspected the site and recorded inspection note dated 31-10-1968 (18A). In this inspection note, he wrote; 'The only thing which was shown to me on behalf of the appellants is that the wall in the second and third stories is built on the side of the respondent after leaving portion towards the appellant and the respondent has built his wall over the said wall.'

13. It may be indicated here that the appellant before the Civil Judge was the plaintiff-respondent. A perusal of the trial Court's Judgment clearly shows that the wall on the second and third stories was constructed by the plaintiff. Therefore, the Civil Judge was justified in saying that the wall on the second and third stories was built by the plaintiff on the southern half width of the disputed wall leaving 4 1/2' width towards the north.

14. The learned counsel for the respondent contended that the finding arrived at by the learned Civil Judge was finding of fact and even if it was erroneous it could not be interfered with by this court in second appeal. Reliance was placed on two cases; Raruha Singh v. Achal Singh, AIR 1961 SC 1097 and Sinha Ramanuja Jeer v. Ranga Ramanuja Jeer, AIR 1961 SC 1720. In the first case it was observed (at page 1099):

'This Court has repeatedly pointed out that in second appeal the High Court's jurisdiction is confined to questions of law. In this particular case the District Court had pointed out that the trial court had made an obvious mistake in regard to the date of the construction of the Panbharan, After all the questions at issue had to be tried in the light of oral evidence and surrounding circumstances. In such a case, if the appellate court recorded definite findings it was not open to the High Court to attempt to reappraise that evidence.'

15. The position that follows from the above observation is that if the lower appellate Court recorded definite findings in the light of oral evidence and surrounding circumstances, the High Court cannot interfere in second appeal and cannot attempt to reappraise the evidence.

16. In the second case the relevant observation reads as follows (at pp. 1729, 1730):

'In the second appeal, the learned Judge of the High Court, on a review of the

evidence, disagreed with the learned District Judge and accepted the finding of the learned Subordinate Judge, and held, for similar reasons, that the plaintiff was virtually an office-holder in the main temple; he further held that the plaintiff could also be considered to be the holder of the office of arulipad and, in that capacity also he was entitled to the first theertham and other honours. The first question is one of fact. The learned District Judge, though he differed from the Subordinate Judge, held, on a consideration of the entire evidence that the plaintiff was not an office-holder in the Athinathalwar temple. It has now been well settled that the High Court has no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, howsoever gross the error may seem to be. The judgment of the learned Judge does not disclose that there are any permissible grounds for interference with the finding of the District Judge.'

17. It will be noticed from the above that the District Judge reversed the finding of the Civil Judge on a consideration of the entire evidence.

18. In the instant case the learned Civil Judge disagreed with the trial court only for one reason which has been stated above. The learned Civil Judge did not at all analyse and discuss the points upon which the trial court came to the conclusion that the wall on the ground floor was joint of the parties. It is thus evident that the learned Civil Judge did not arrive at the finding on a consideration of the entire material. The Civil Judge discarded the entire oral and documentary evidence and based his finding simply on one circumstance appearing in the case. In these circumstances, it cannot be said that the Civil Judge recorded a finding of fact which cannot be interfered by this Court in second appeal. Precisely speaking the finding recorded by the Civil Judge is simply an inference from a circumstance. The Civil Judge did not at all examine the oral evidence of the witnesses. He did not negative the facts found by the trial court in coming to the conclusion that the wall on the ground floor was joint of the parties.

19. The learned counsel for the appellants contended that as the learned Civil Judge did not place reliance on the oral and documentary evidence of the plaintiff-respondent, he should have better dismissed the suit. This contention is not correct because the trial court found that the wall on the ground floor was joint of the parties and that the wall on the second and third stories was built by plaintiff-respondent upon which the defendants-appellants had made encroachments. Even in the written statement the defendants-appellants alleged that the wall in question was joint of the parties. If the appellants encroached upon the joint wall, the suit could not be dismissed in toto and appropriate relief should have been given to the plaintiff-respondent.

20. There are certain salient features in the case. They are (1) The shop of the plaintiff-respondent was a double storeyed one from before the year 1946 as is evidenced from the partition deed dated 10-8-1946 (Ex. 1). (2) The walls on the second and third stories were constructed by the plaintiff-respondent. (3) Previously the shop of the defendants-appellants was single storeyed. The defendants-appellants pulled down their shop shortly before the filing of the present suit and then they reconstructed the shop. (4) There was only one Parnala of both the shops on the Asar of the disputed wall as stated by Chunni Lal (P.W. 2) tenant of the respondent's shop. (5) There was a Niche in the wall on the ground floor towards the appellants' shop. (6) There is nothing on record to show that previously the two shops belonged to two different persons. The possibility of both the shops being owned by one person is not

ruled out.

21. The learned Civil Judge did not take into consideration these salient facts. These facts were taken into consideration by the trial court. In this circumstance the Civil Judge was not at all justified in reversing the finding of the trial court that the wall on the ground floor was joint of the parties. Correctly speaking the trial Court assigned good reasons for concluding that the wall on the ground floor was joint of the parties. In these circumstances, the judgment and decree of the learned Civil Judge cannot be sustained and has to be set aside.

22. The learned counsel for the appellants could not assail the decree passed by the trial court. There is no cross-objection by the plaintiff-respondent.

23. In view of the above, the appeal is allowed and the judgment and decree dated 3-12-1968 passed by the Civil Judge are set aside and the judgment and decree dated 23-11-1967 passed by Munsif, Nagina are restored. In the circumstances of the case parties, shall bear their Own costs incurred in this court.

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