Vyas Gopichand Vs. Mattoo Lal and ors.

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Court : Rajasthan

Decided On : Nov-19-1970

Reported in : AIR1971Raj237

Judge : C.M. Lodha, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Order 2, Rule 3 - Order 6, Rules 2 and 17; Easements Act, 1882 - Sections 15

Appeal No. : Second Appeal No. 364 of 1964

Appellant : Vyas Gopichand

Respondent : Mattoo Lal and ors.

Advocate for Def. : S.L. Mardia, Adv.

Advocate for Pet/Ap. : R.K. Kapoor, Adv.

Judgement :

C.M. Lodha, J.

1. This is a plaintiff's second appeal arising out of a suit for injunction.

2. The houses of the parties and some other persons are situated in the same compound in the city of Jaipur. In order to understand the nature of the dispute arising between the parties it may be useful to refer to the plan Ex. 1 filed by the plaintiff. The plaintiff's house is shown in the plan in yellow colour, and the defendant Harinarain's house has been shown in blue colour. It may be stated here that the defendant Harinarain died during the pendency of this litigation and is now represented by his heirs who are respondents Nos. 1 to 7 before me. The plaintiff's case as set out in the plaint is that the 'Tibara' shown with the mark 'G' in the plan is the joint property of the parties, and that the portion marked 'H' contiguous to 'G' towards the west is common to the parties and Bharatmal.It was alleged that on 13-11-1957 the defendant raised a wall between the portions 'G' and 'H' and put shutters in it and after closing the door of the plaintiffs room 'F' opening in the 'Tibara' 'G' at the point 'E' the defendant' deprived the plaintiff altogether of the use of the 'Tibara' 'G' as well as 'H' which the plaintiff used as a passage for coming into and going out of the room 'F'. It was further alleged that the defendant had wrongfully converted the 'Tibara' 'G' to his own exclusive use by making it a kitchen.

The plaintiff's case in the first instance was that the Tibara' 'G' and 'H' jointly belonged to the parties, and in the alternative he pleaded that in case he failed to

prove his joint ownership to the 'Tibara' 'G' he was still entitled to use the 'Tibara' 'G' as a passage by way of easement. On these allegations the plaintiff prayed that the wall raised by the defendant between the Tibaras' 'G' and 'H' may be ordered to be demolished and so also the obstruction put by the defendant at the plaintiff's door 'E'. He also prayed for a perpetual injunction restraining the defendant from obstructing the plaintiff in using the 'Tibaras' 'G' and 'H' as a passage for coming into and going out of the room 'F'. The defendant denied the plaintiff's suit and pleaded inter alia that the 'Tibaras' 'G' and 'H' exclusively belonged to the defendant and that the plaintiff had not acquired any right of way by prescription through the said 'Tibaras'.

3. After recording the evidence produced by the parties the learned Munsiff (West) Jaipur City dismissed the plaintiff's suit.

4. Aggrieved by the judgment and decree of the trial Court the plaintiff filed appeal, but the same was dismissed by the learned Senior Civil Judge, Jaipur City No. 1 by his judgment dated 12-2-1964. Consequently, the plaintiff has come in second appeal to this Court.

5. Learned counsel for the appellant has urged that the Courts below had wrongly disallowed his application for amendment of the plaint which he had submitted in the trial Court on 27-11-1961. It may be observed that by the proposed amendment the plaintiff wanted to introduce a case for easement of light and air through the door 'E', which he had not set up in the plaint filed by him as far back as on 4-1-1951. The learned Senior Civil Judge came to the conclusion that the proposed amendment would introduce a new case. I have looked into the plaint and it is amply clear from the allegations made therein, that the plaintiff claimed a right of passage through the 'Tibara' in question on the ground that it was jointly owned by the parties and that in any case he had acquired aright of way by prescription, through it. There was no question of light and air raised in the plaint at all. The application for amendment was also considerably belated. In these circumstances, I do not see any ground for interfering with the discretion exercised by the lower Courts in disallowing the application of the plaintiff for amendment of the plaint.

6. The next contention raised by the learned counsel for the appellant is that the Courts below had wrongly shut out his case based on the ground of easement simply because he had alleged in the plaint that he was joint owner of the 'Tibara' in question, besides alleging in the alternative that he had acquired a right of way by prescription through the 'Tibara'. It is submitted that the learned Senior Civil Judge did not correctly appreciate the rationale of the decision in Kesardeo v. Nathmal, AIR 1966 Bom 266, and that the principle laid down in Magniram v. Rustam, 1961 Raj LW 213, and Sayrabai v. Ahmedji, AIR 1960 Madh Pra 111, has not been correctly appreciated. His argument is that the mere fact that the plaintiff has asserted his ownership to the 'Tibara' would not be sufficient to defeat his claim for his right of way by easement and that the Courts below should have examined the evidence led by the parties to determine whether the plaintiff had succeeded in proving his claim based on easement for right of way. In support of his contention he has relied upon Shivpyari v. Mt. Sardari, AIR 1966 Rai 265, AIR 1960 Madh Pra 111, Atiqa Khatoon v. Aqila Bano, AIR 1956 All 415, Maharaj Singh v. Baljit Singh, AIR 1967 All 572, Dwarka v. Ram Jatan, AIR 1930 All 877. Subba Rao v. Lakshmana Rao, AIR 1926 Mad 728 (FB) and Narendra Nath Barai v. Abhoy Charan Chattopadhya, (1907) ILR 34 Cal 51 (FB).

7. I do not think it necessary to discuss the authorities relied upon by the learned counsel for the appellant in detail as in my opinion most of them have been referred to and thoroughly discussed in the judgment of D. M. Bhandari J., in AIR 1966 Raj 265. Bhandari J., observed as follows:--

'If a person under a mistaken belief that he has a higher right of ownership over the land of the other which he has in fact not got, has been doing for the requisite period of 20 years something which is otherwise sufficient for the acquisition of the right of easement he must be deemed to have acquired such right notwithstanding the fact that in his mind whatever he is doing, he is doing in the belief that he is the owner of the other land though it turns out that he is not the owner of that other land.'

It was further observed :

'Unity of ownership is thus destructive to the acquisition of the right of easement but the same cannot be said of a person who is making an unfounded claim on another land if as a matter of fact he is making only a limited use of the other land.'

It is important to note that it fs only in cases where a person has exclusive possession of another land over which he seeks to acquire easement that prima facie, the physical acts which he is doing on the land of the other will be referred to his exclusive possession, unless there is strong evidence that the animus was only to acquire an easement.

8. In AIR 1956 All 415, it was held that even if the owner of the dominant tenement claimed to be a joint owner of the servient tenement he could not have properly claimed a right to receive light and air or a right of way over the joint land and it was open to the other joint owner to resist the claim if made. The essential ingredient at 'animus' is there if the servient tenement does not belong to the person claiming the easement absolutely and if the exercise of the right is capable of being resisted.

9. Again In AIR 1967 All 572, where a person was discharging water for over 20 years from a house of which he was exclusive owner over the land belonging to the coparcenery of which he was a member but in respect of which he had no right to flow water, it was held that he had acquired a prescriptive right of easement to flow water on coparcenery land.

10. It is true that no plaintiff can be allowed to take the impossible position of being the owner of and of having a simultaneous right of easement over the same land. But where the reliefs claimed upon ownership and upon the right of easement in respect of the same property are not claimed simultaneously, but in the alternative there is no law which bars the plaintiff from reiving on the alternative claim, even though the action of the plaintiff may not be commendable. This was the view taken in AIR 1930 All 877.

11. Again in AIR 1926 Mad 728 (FB), it was held that the mere putting forward of a claim of ownership in legal proceedings is not conclusive against a right of easement.

12. In AIR 1966 Bom 266, it was observed in Para 5 that it is only in case of other easements (that is easements other than those for the access and use of light and air and for support) that it is necessary to enjoy them as of right in order to acquire an absolute right in respect of them. In the operative part of the judgment it was held

that in theabsence of any belief in the ownership of the land it must be presumed that the plaintiff had the animus of enjoying the right of easement as an easement.

13. It may be observed that in Magniram's case, 1961 Raj LW 213, the learned Judge cited with approval the following observation from AIR 1926 Mad 728 (FB),

'Our opinion Is that while the mere putting forward of a wider claim in legal proceedings is not conclusive against a right of easement, yet the question quo animo egerit to what purported character are the acts of user to be ascribed is one which the Court must answer.'

14. In the later case of this Court AIR 1966 Raj 265, it has been made further clear that there may be a set of circumstances in a claim for easement where animus may be of no importance unless the user is referable to exclusive possession whereby he cannot be deemed to acquire any right of easement except under very exceptional circumstances.

15. I am In respectful agreement with the view expressed in AIR 1966 Raj 265, and consequently hold that the finding of the learned Senior Civil Judge that the plaintiff cannot claim the right of easement of passage because he had based his suit with respect to it on the alleged right of joint ownership to the 'Tibara' is not correct I am further of opinion that even though the plaintiff had based his claim with respect to a right of way through the 'Tibara' in question both on account of joint ownership as well as easement in the alternative, his claim for easement cannot be rejected on the sole ground that he had made such a claim on the basis of joint ownership also. In this view of the matter, it is necessary to determine whether the plaintiff has succeeded in proving his right of passage by prescription through the 'Tibara' in question.

16. As regards the merits of the plaintiff's claim regarding easement, none of the Courts below have discussed the evidence led by the parties. The learned first appellate Court has rejected the plaintiff's claim in this respect on the ground that P. W. 2 Mangla had stated that the plaintiff's room had been used as a store and consequently the case of right of wav through the door 'E' is ruled out. This argument is apparently fallacious because the right of way can be claimed to the room 'F' irrespective of the question as to what use the room may be put. The other ground relied upon by the lower appellate Court for rejecting the plaintiff's claim for easement is that the door 'E' is at a height of 1' from the ground level of the 'Tibara' and that the height of the door is only 5'. and consequently the door could not have been used for egress and ingress. This groundhas also no substance inasmuch as the door 'E' can be used for entrance into and exit from the room 'F' even if its height is only 5' and the sill of the door Is at a height of 1' from the floor of the 'Tibara'.

It is conceded by the learned counsel for the parties that the relevant evidence produced by the parties as to the right of passage claimed by the plaintiff through the 'Tibara' 'H' has not been discussed at all. In the circumstances the only proper course is to send the case back to the first appellate Court for decision regarding the claim made by the plaintiff of the right of way by prescription on merits.

17. The result is that I allow this appeal, set aside the judgment and decree of the Senior Civil Judge, Jaipur City No. 1 dated 12-2-1964 and remand the case to the Court of Additional District Judge No. 1, Jaipur City for a fresh decision after hearing

the parties on the lines indicated above.

18. In the circumstances of the case, I leave the parties to bear their own costs.