

**(2010) 05 MP CK 0026**

**Madhya Pradesh High Court (Gwalior Bench)**

**Case No:** Second Appeal No. 524 of 2002

Smt. Prembai and Others

APPELLANT

Vs

Ghanshyam and Others

RESPONDENT

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**Date of Decision:** May 7, 2010

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 14 Rule 1, Order 26 Rule 9
- Specific Relief Act, 1963 - Section 2, 38, 38(1), 38(3)

**Citation:** (2010) 4 MPHT 444 : (2011) 1 MPJR 213 : (2010) 3 MPLJ 345

**Hon'ble Judges:** A.K.Shrivastava, J

**Bench:** Single Bench

**Final Decision:** Allowed

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### **Judgement**

A.K. Shrivastava, J.

This second appeal has been filed at the instance of some of the Defendants assailing the judgment and decree passed by learned two Courts below whereby the suit for injunction of the Plaintiff/Respondent No. 1 has been decreed.

The Plaintiff filed a suit for injunction by pleading that he is having one plot admeasuring 30".2" x 76". 10", which was purchased by him vide registered sale-deed dated 25-11-1978 and, hence, he is the owner of the said property. In Para 2, it has been pleaded that on the northern side of his plot firstly there is an open land and thereafter the house of Defendants is in existence. According to the Plaintiff, the Defendants are trying to open doors, windows and drains towards the Plaintiff's plot which has been shown in the plaint map. Further, it has been pleaded that, the Defendants are not having any right, title or interest to open windows etc. on Plaintiff's property and if they succeed, later on they may also claim their right of easement and may also start to flow the filthy water from drains. In Para 5 of the plaint it has been pleaded by the Plaintiff that on 1-4-1985 by inserting the flagstones (patiya) the Defendants have built up a Cantilever having 1.6" width and

35".8" length and when it was refrained by the Plaintiff not to insert the flagstones (patiya) and also not to build and Cantilever on it, they did not agree, as a result of which, he submitted a report on the same day in the police station. Further, it has been pleaded by the Plaintiff that when on 2-4-1985 he started digging the plinth of his plot to erect east-west wall, Defendants did not permit him and started quarreling. Hence, a suit for injunction has been filed by Plaintiff praying that Defendants be restrained not to stop the Plaintiff from digging the plinth of his plot and to erect the wall and further they should not open any doors, windows, drains, cantilever etc. on the Plaintiff's plot and the cantilever which has been erected towards the Plaintiff's plot be removed by them.

Defendant No. 1, Defendant Nos. 2 to 7 and Defendant Nos. 8, 9 and 10 filed their separate written statement.

Learned Trial Court on the basis of the averments made in the plaint and denial in the different written statements, framed necessary issues and after recording the evidence of the parties decreed the suit of Plaintiff. The First Appeal which was filed by some of the Defendants who are also Appellants in this appeal has also been dismissed by the impugned judgment and decree.

In this manner, this Second Appeal has been filed by some of the Defendants before this Court.

On 7-4-2003 this Court admitted the second appeal on the following substantial questions of law:

1. Whether on the specific pleading of Defendant that Plaintiff is encroaching upon 3 ft. land-strip the suit could be decreed without demarcation of land through the Court ?

Whether in the absence of pleading about public lane Courts below were justified in holding that Defendant has failed to prove that there exists public land ?

Whether in the facts of the case suit for permanent injunction is maintainable ?

The contention of Shri Naik, learned Counsel for the Appellants, is that as per own showing of Plaintiff in Para 2 of his plaint, adjoining to his plot there is an open land of Defendants and thereafter their house is in existence. In Para 5, it has been pleaded by Plaintiff that on 1-4-1985 a cantilever has been erected by the Defendants having 1.6" width and 35".8" length, but in absence of any agreed map and without appointment of Commissioner in order to ascertain whether the said cantilever is projecting any part of Plaintiff's property (plot) or not, the learned two Courts below erred in substantial error of law in decreeing the suit of Plaintiff. In support of his contention, learned Counsel has placed heavy reliance on the Division Bench decision of this Court in *Durga Prasad v. Parveen Foujdar and Ors.* 1975 J LJ 440.

In order to substantiate substantial question of law No. 2 my attention has been invited to the written statement filed by Defendant Nos. 8, 9 and 10 and it has been argued by learned Counsel for the Appellants that in the written statement of these Defendants nowhere it has been pleaded that in between the plot of Plaintiff and Defendants' house there is any public lane (gali), therefore, the finding of learned two Courts below holding that Defendants have not proved that in between the plot of Plaintiff and Defendants' house there is a public lane is ex facie perverse and in absence of such a pleading of Defendants in their written statement, the alternative issue No. 1 has been wrongly framed and, hence, the decision is based by adopting a wrong line of action.

By putting a deep dent on the case of Plaintiff it has been argued that a suit for injunction is not maintainable and as a matter of fact looking to the pleadings of the Defendants, the suit for declaration of title ought to have been prayed by the Plaintiff. In support of his contention learned Counsel has placed reliance on the Single Bench decision of this Court Ramkaran v. Pyaribai and Ors. 1997 RN 38, and therefore, substantial question of law No. 3 be also decided in Appellants' favour. On these premised submissions, it has been argued by learned Counsel that this appeal be allowed and the judgment and decree passed by learned two Courts below be set aside and the suit of Plaintiff be dismissed.

On the other hand, Shri K.N. Gupta, learned Senior Counsel, argued in support of the impugned judgment and has submitted that the Plaintiffs sale-deed (Exh. P-1) and the map (Exh. P-2) attached to it is not disputed by the Defendants' witness Babu Shah (D.W. 2). Further it has been contended by him that there is an admission of Defendant No. 10 Nirmaladevi (Appellant No. 4) in Para 25 of her cross-examination that in the sale-deeds which were executed by her vendors and ultimately to her, the description of lane (gali) has not been mentioned, therefore, the cantilever which has been erected by the Defendants is on the part of the Plaintiff's land of which the Plaintiff is the owner. Hence, it has been prayed that this appeal be dismissed.

Having heard learned Counsel for the parties, I am of the considered view that this appeal deserves to be allowed in part.

Regarding Substantial Question of Law No. 1:

On going through the pleadings of Plaintiff made in Para 2 of his plaint, this Court finds that specifically it has been pleaded by him that adjoining to his plot there is an open land and thereafter Defendants' house is in existence. It has been rightly pointed out by learned Counsel for the Appellants that the Plaintiffs sale-deed (Exh. P-1) in which the description of his plot has been mentioned, in it also it has been so described that on the northern side there is an open land and thereafter the house of Krishnagopal Mundra is in existence and, therefore, since Plaintiff's own case is that in between his plot and Defendants' house there is an open space, therefore,

whether any cantilever is being projected on the Plaintiff's plot or not, this was required to be ascertained by appointing a Competent Commissioner by directing him to examine the spot and to give report as to whether any projection of cantilever covers any portion of the Plaintiff's property or not and similarly whether the doors, windows and the drains are trying to be opened by the Defendants on the Plaintiff's property or not. Since this has not been done, according to me, the suit of Plaintiff for injunction cannot be decreed. In this regard, the Division Bench decision of Durga Prasad (supra), placed reliance by the learned Counsel for the Appellants is quite relevant. There are two more decisions of Supreme Court on the point and they are Shreepat v. Rajendra Prasad and Ors. 2000 (6) Supreme 389 and [Haryana Waqf Board Vs. Shanti Sarup and Others,](#)

That apart, I do not find any merit in the contention of learned Counsel for the Respondent No. 1/Plaintiff, that an application was submitted by Plaintiff to appoint the Commissioner which was vigorously apposed by Defendants and accordingly the learned Trial Court dismissed that application on 28-7-1995 and, therefore, now the Defendants are estopped from raising this ground. According to me, if there is a dispute about the demarcation of the boundaries, the Supreme Court and this Court have interpreted the law as envisaged under Order XXVI Rule 9, CPC that in such a situation it would be appropriate to the Court to appoint a Competent Commissioner and, hence, it is the law of land which is to be followed and, therefore, in these facts and circumstances, there cannot be any estoppel against law. The substantial question of law No. 1 is thus answered in favour of Appellants.

Regarding Substantial Question of Law No. 2:

The contention of learned Counsel for the Appellants that in the written statement of Defendant Nos. 8, 9 and 10 it has not at all been pleaded that in between the house of Defendants and Plaintiff's plot there is any public lane and, therefore, the finding of learned two Courts below holding that Defendants have failed to prove that there exists any public lane is ex facie perverse. The argument at the first blush appears to be quite attractive, but on deeper scrutiny it is found to be devoid of any substance. On going through Paras 4 and 6 of the written statement of other Defendant Nos. 2 to 7, I find that specific pleading of these Defendants is that in between the house of Defendants and Plaintiffs plot there is a public lane (gali). According to me, the aim and object of framing issue as envisaged under Order 14 Rule 1, CPC is that if on the basis of material proposition of fact and law affirmed by one party and denied by the other, an issue is required to be framed by the Court. Hence, looking to the contradictory stand of Defendant Nos. 2 to 7 and 8 to 10 in their written statements, after framing issue No. 1 rightly an alternative issue has also been framed by learned Trial Court "whether there is any public lane in between the two properties or not" ? No doubt, it is true that in the written statement of Defendant Nos. 8, 9 and 10, it has not been pleaded that in between the Plaintiff's plot and Defendants' house there is a public lane and only this much

is pleaded that there is an open space in between these two properties, but there is specific pleading of Defendant Nos. 2 to 7 in respect of existence of public lane (gali) in between the Defendants' house and Plaintiff's plot and for this reason only rightly an alternative issue of issue No. 1 has been framed by learned Trial Court. In these facts and circumstances Single Bench decision of this Court in Ramavtar Budhouwa v. Smt. Susheela Singh and Ors. 2007 (1) J LJ 54, placed reliance by learned Counsel for Appellants is not applicable in the present factual scenario. The substantial question of law No. 2 is thus answered against the Appellants. Regarding Substantia] Question of Law No. 3:

On going through Para 1 of the plaint of the Plaintiff, this Court finds that there is specific pleading of Plaintiff that he is the owner of the plot which he brought vide registered sale-deed dated 25-11-1978 admeasuring 30'2" x 76'.10". Although the pleading of Plaintiff has been denied by all the Defendants but according to me, simplicitor suit for injunction is maintainable because as per Section 38 of the Specific Relief Act, 1963 (hereinafter referred to as the Act), a decree of perpetual injunction may be granted to the Plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication. On going through Sub-section (3) to Section 38 of the Act, this Court finds that Plaintiff's suit for injunction is maintainable because the Defendants have threatened to invade Plaintiff's right to enjoy the property. Further on going through Sub-section (1) and Sub-section (3) to Section 38 of the Act, since the Defendants are trying to breach an obligation existing in favour of the Plaintiff as it has been pleaded by him that he is the owner of his plot as well as Defendants have given threat to him not to enjoy his plot, for no rhyme and reason it can be held that the present suit of Plaintiff simplicitor for injunction is not maintainable. The expression "obligation" has also been defined in the said Act and according to Section 2(a), the obligation would include every duty enforceable by law and, therefore, if Defendants are trying to breach the obligation of Plaintiff to enjoy his property, certainly suit for injunction which has been filed by him is maintainable. Apart from this, on going through the testimony of Defendant Smt. Nirmala Mundra (D.W. 1) and Babu Shah (D.W. 2), this Court finds that the Defendants have not disputed that the Plaintiff is not the owner of the plot, the description of which he has given in his plaint. In this view of the matter, learned Single Bench decision of this Court in Ramkaran (supra), is not applicable. This substantial question of law is also answered against the Appellants. For the reasons stated hereinabove this appeal succeeds in part. The judgment of two Courts below is hereby set aside and the case is remanded back to learned Trial Court to appoint a Competent Revenue Officer of Municipality, Vidisha to get the spot examined in presence of the parties or their Counsel and to submit the report in the Trial Court specifically mentioning as to whether the Defendants have constructed any cantilever covering any portion of the Plaintiff's property and also as to whether any drains, doors, windows etc. are being opened by Defendants on the Plaintiff's property. Since the matter is quite old, as the suit was filed on

4-4-1985, viz., more than 25 years ago, I hereby direct learned Trial Court that after obtaining the report of the Court Commissioner the suit may be decided on or before 30th September, 2010. The parties shall be free to raise objections on the Commissioner's report and may also cross-examine him on his report. But, the Trial Court shall decide the suit on or before 30th September, 2010.

Looking to the facts and circumstances of the case, parties are directed to bear their own costs.