Mannalal Kanchedilal Vs Dalchand Kanhaiyalal

Court: Madhya Pradesh High Court (Indore Bench)

Date of Decision: Aug. 5, 1960

Acts Referred: Evidence Act, 1872 â€" Section 91

Citation: (1962) JLJ 220 : (1961) MPLJ 410

Hon'ble Judges: H.R. Krishnan, J

Bench: Single Bench

Advocate: S.D. Sanghi, for the Appellant; Vijayavargi, for the Respondent

Final Decision: Allowed

Judgement

H.R. Krishnan, J.

This is an appeal by the plaintiff from the judgment of the first appellate Court reversing the decree in his favour passed by the trial Court restraining

by perpetual injunction the defendant from constructing any structure on a narrow strip of open land between the two houses-which at the time the

suit was filed and the order of temporary injunction was made, was found to be 37"" long and 27"" wide-and in any other manner interfering with the

plaintiff"s right of draining the water from his roof into this strip used as ""abchuk"". Both the Courts have rejected the plaintiff"s assertion of a right of

easement for air and light in that direction; there is no objection to the defendant"s building on his land beyond the abchuk already described.

This case raises important questions regarding the common land (or intervening land) between two houses used solely for draining of the rain

water, without any other evidence of title-whether (a) it is joint property with the owners of the two adjoining houses having equal joint right over

every square inch, (b) it is common land in the sense that title vests in either owner upto the middle thread with an easement for draining water

vesting in either owner in the half belonging to the other, or (c) it belongs to one of the two, with the other having over it an easement mentioned in

(b). In general, the case resembles the one about intervening walls. There are further questions regarding the competency of the second appellate

Court.

The facts of the case are the following. The plaintiff came into his present house in 1930, by purchase by Ex P/1. The house itself faces north; and

facing in the same direction and to the west of it is the defendant''s house. Originally owned by Kudratulla, it was first bought by Raja Mian alias

Ahmad Mohammad, who, in his turn sold it by Ex. D/1 to the defendant in 1949. The plaintiff averred in his plaint that in between the two houses,

there was a narrow strip of land for an abchuk (water drain) and described in his sale deed as ""Koocha Kudratulla"". The roof water from both the

houses falls into this and thence finds its way ultimately into the public road. He was the owner of this strip of land and was all the time exercising

this right in appropriate manner of letting his roof water drain into it. In the alternative, he had at least a right of easement by using this strip of land

for three purposes, water drainage, light and air,-the latter two, however, being refused by concurrent decisions of the lower Courts. The

defendant-a new comer-was preparing to put up a new construction and was beginning to encroach on this strip of land on the 5th February,

1955, with a view to building right upto the eastern extremity, thereby including it into his own house and depriving the plaintiff of his property in

that passage and making it impossible for him to drain the water. Accordingly, he sought permanent injunction restraining the defendant from

encroaching on the passage and interfering with the plaintiff''s use of it as abchuk. As usual, temporary injunction was sought and given. The point

to note is that when the temporary injunction was given, the passage was found to be 37"" long and 27"" wide. But whether or not the passage had

been wider and the defendant had already made any encroachment and thereby narrowed it, could not be decided in this litigation, which has

proceeded on the assumption that the width was at least 27"".

The defence was that there was no passage whatsoever, or abchuk between the houses and no right, title or interest of the plaintiff beyond his

western wall. It was the defendant''s land upto that very wall and as such he was entitled to put up any structure on his property. The plaintiff has

no right of easement of air, light or water-drainage. In the alternative, the defendant also pleaded that even if the plaintiff had a right of easement to

drain his roof water, he cannot be allowed to succeed in his attempt of enlarging it. Till shortly before the suit, his wall in that side was only 8"" high;

but now he has raised it to a much greater height and thereby seeks to let the water pour with greater force. Even if he had had an easement, he

could not claim it in this enlarged form.

In the trial Court, the questions were, firstly, whether there was a passage; secondly, whether it was part of either of the two house sites; thirdly, if

it was not that of either house, whether it was common property used as abchuk, that is, a water drain. The question of easement was also touched

upon and the plaintiff''s right of air and light from the direction of the abchuk was examined and negatived. However, it was held by the trial Court

that there was an open strip and it was not part of the house of the defendant and so, was common property appropriated for use as abchuk. The

trial Court also found that even on the theory that the plaintiff had an easement right of draining water, the fact of his wall having been raised did not

have the effect of enlarging the easement. The suit of the plaintiff was completely allowed as far as the water-draining into the passage of 27"" width

which alone was found at the time of the suit, was concerned.

The defendant went up in appeal and the first appellate Court reversed the findings. It also disbelieved the defendant''s story that there had been no

passage and held that there was a passage which of course was a patent fact. But the appellate Court''s finding was that the passage was part of

the land sold by Kudratulla to Raja Mian and by Raja Mian in his turn, to the defendant, though it had not been built over. So, the strip was wholly

the property of the defendant. On the alternative case of easement for draining the water, the appellate Court held that the plaintiff could not

succeed in enlarging it by allowing the water drop from a greater height and thereby putting a heavier burden on the land of the defendant. In effect,

it dismissed the suit.

This second appeal involves consideration of the proper meaning and the effect of the recitals in the two title deeds and the propriety of otherwise

of the appellate Court''s accepting in regard to the east-west frontage of his house, the defendant''s oral evidence in face of the contents of his own

sale deed. Both are ultimately issues relating to facts; but they involve also questions of law such as have to be considered in second appeal.

Further, by the very nature of the case, the only appropriate fact of enjoyment of the intervening strip of land being the draining of the rain water

and in the absence of other evidence, it could be presumed to be ""common land"". Theoretically, it may fall into one of three types already set out;

the problem in the present is to decide which of the three descriptions applies to this common land.

In regard to the existence of the passage or open strip between the houses, the plaintiff was right and the defendant brazenly falls. Even after the

suit was filed, there was still 27"" width left. For our purposes, it is really unnecessary to decide whether the strip had been wider still; but the denial

of such a patent fact by the defendant shows that he had hoped, by the time the Court would look into it, to complete his encroachment. As both

the Courts have found on the existence of the open strip used as abchuk, the defendant''s false allegation should at least put them on guard against

accepting his oral evidence unless supported by credible circumstances and documents. Whether we call it koocha or passage is immaterial

because both the words are used generally in the same sense. In Ex. P/1 the plaintiff''s title deed, the adjoining house on the west was described as

the house of Kudratulla and in addition, it was also mentioned that there was a ""Koocha-Kudratulla"" used as abchuk, that is, water drain. The

appellate Court thinks that the very fact that the koocha has been called ""Koocha Kudratulla"" shows that the strip was really land belonging to

Kudratulla and not to the vendors of the plaintiff either wholly or in part. Certainly, there is something in it; but that by itself, does not conclude the

issue. The recitals in similar title deeds are also to be studied.

Sometime after 1930, Kudratulla sold his house to Raja Mian and Raja Mian, who has deposed on behalf of the defendant, asserts that he made

over the deed to the defendant when he sold the house to him. This is, of course the usual practice. The recital in regard to the east-west length of

the defendant''s house, set out in Raja Mian''s sale deed would have been of very considerable assistance to the defendant who asserts that Raja

Mian''s sale deed (unlike his own) has a correct description of this length. This latter (D/1) also mentions the passage, but only as ""Koocha-

abchuk"" without mentioning Kudratulla or Raja Mian. In view of the failure of the defendant to produce the earlier sale deed in favour of his

vendor, it would be just to assume that the recital in that deed is substantially the same, namely, Koocha-abchuk without any name. Thus in two of

the three documents it is just ""Koocha abchuk"" which very considerably reduces the effect of the mention of Kudratulla''s name in the third. We are

dealing with an open strip of land without any exclusive manner of enjoyment; so, the mere mention of a name in one only of the three documents

does not establish that it is the property of that person. All that we get is that there was a passage used as abchuk between the two houses.

Whether this Koocha-abchuk was really part of the house site purchased by the defendant can be ascertained from the dimensions given in the

defendant''s own sale deed D/1. It describes the east-west frontage as 30"". The north-south frontage is 37"" of which there is no controversy. The

defendant''s oral evidence is that this is a mistake and actually, the directions have been exchanged inadvertently; in other words, the east-west

frontage is 37"", in which event, it would give a few more feet over the frontage of the house proper. The trial Court has refused to accept this while

the appellate Court has accepted and based on this, its decision on the issue of ownership. The question is primarily one of law though the ultimate

effect is on facts.

It has been argued on behalf of the defendant-respondent that there is no ban in the Evidence Act against a party to a transaction, the terms of

which are reduced to writing, from varying its terms by means of oral evidence in course of litigation with a third party, because, section 92 as such

prohibits admission of oral evidence to contradict or otherwise modify the terms of the agreement ""as between the parties to the instrument"". This is

certainly not a case between the defendant and Raja Mian. Actually, the section applicable is the general one in this regard, i.e., section 91 of the

Evidence Act. The dimensions of the property sold is a term of the transaction that has been reduced (as it has to be under the law) to writing.

Raja Mian is selling exactly what he has got from Kudratulla and if the defendant and be are to be believed, the description in Raja Mian''s sale

deed is just what they want the Court to believe; that is, the east-west frontage is 37"". If so, nothing should have been easier for the defendant than

to produce it, and point out that in view of the earlier recital that one in the later (defendant''s sale deed) has an inadvertent mistake. That would

have been a case of simple and effective argument and not oral evidence in proof of the terms of an agreement not contained in the appropriate

instrument. The failure on the part of the defendant who is in possession of that document, to produce it in evidence, leads to the definite inference

that in that document as well, the east-west frontage is noted as 30"" and not 37"".

In this connection, it is of interest to note that as long ago as 1917, the Privy Council took note of the very common practice of litigants in our

country holding back important documents. [T.S. Murugesam v. M.D. Gnana Sambandha AIR 1917 PC 6]:

A practice has grown up in Indian Procedure of those in possession of important documents or information lying by, trusting to the abstract

doctrine of the onus of proof, and failing accordingly to furnish to the Courts the best material for its decision. With regard to third parties, this may

be right enough; they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordships'' opinion, an

inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession

which would throw light upon the proposition.

The position here is worse for the defendant, to whose interest it was to produce that document. Yet, he has failed to do. This shows that the

recital there is exactly the same as in the present document.

It is further argued for the respondent, that it is a question of fact whether the house frontage sold to the defendant was 37"" in which case, the

abchuk such as it was, would be his property or 30"" in which event, it would not be his property. The first appellate Court having decided it, it is

not for the second appellate Court to examine it again; after all, this would be a finding of fact, and, however unreasonable it may appear to the

second appellate Court, it should not interfere. Here the position is different. The first appellate Court has come to this finding on the basis of the

defendant''s evidence on the terms of disposition of a property different, in the face of two documents, one of which was actually, and the other by

proper inference, literally crying against oral evidence This becomes at least, a mixed question of law and fact which calls for examination by the

second appellate Court.

Where the question is, whether it is open to a person to plead the existence of a transaction at variance with the tenor of a deed to which he was a

party, it is a pure question of law which it is the duty of the second appellate Court to examine Vinayak v. Bhondu 1942 NLJ 316 : AIR 1912 Nag

193 : ILR 1942 Nag. 349.

It is to be noted that according to the position the defendant chose to adopt, the width of the open land between his house and that of the plaintiff

should be about 7''''. Certainly, be began with the assertion there was no such open land; but when faced with the facts of its existence even at the

time of the suit, after he had started his building operations in that direction, he pleaded that whatever open land there was, was really his though it

remained unbuilt for the time. Actually, it was only just over 2'''' at the time of the suit. But this by no means, shows that the strip was part of the

defendant''s house site. There is always a margin of error in such measurements; when the distances are short and there are no scientifically located

pillars, it is proportionately wide. Another possibility is that the defendant having started building operations in that direction, had already moved on

part of the open land and all that was left over was this width of 27''''. Be that as it may, it is clear from the recitals of these two deeds before us,

and from what we can infer about the contents of the third deed kept back by the defendant is that this strip of open land was not included in the

defendant''s sale. It was appropriated to the use of the house-owners of both sides as abchuk.

There is no separate deed, nor other direct evidence on the title to this strip of land as such; the only appropriate and actual manner of enjoying it,

being the use of it as water drain by both parties equally. Thus the title to it has to be inferred. In all such cases, it should be presumed that it is the

common property of the parties in enjoyment. Certainly, such a presumption could be rebutted by evidence; but in the absence of evidence, this

would be the fairest inference. I find this view has actually been taken in some of the reported cases for example in the The Secretary of State Vs.

Bhatt Laxmishanker Govindram and Another, , it was an open space in a ''pole'' which was being enjoyed equally by all the surrounding houses

and there was no other evidence of title:

Until the contrary is proved, it may generally be presumed, that the open space in a pole belongs to the owners of the surrounding houses, and it

would be for the owners of the other houses and not the municipality nor the Government to protest against any obstructions caused by the owner

of one house against their common rights.

It is theoretically conceivable that a strip like this, like the intervening wall between two houses, may partake of one of the three alternative

features-first, joint property with joint title over every square inch, second, property divisible into two ownerships each stretching upto the middle

line; third, property, the title of which wholly vests in one, but subject to an easement vesting in the other. On the facts and circumstances of the

present case, I would find that it is alternative ""first""; no doubt, each party tried to claim that it was exclusively his and each has failed.

The alternative case about the easement calls only for a brief mention. The defendant having started with a complete denial of the existence of the

passage, at a second stage came to admit its existence but claimed it as his own. In view of the abchuk, he admitted that the plaintiff had an

easement for this purpose, but urged that by raising the height of the wall, the plaintiff has tried to enlarge this right and cannot be allowed to

exercise it in these circumstances in other words, the defendant would have been willing to let the plaintiff drain the water from a roof supported by

a wall 8"" high; but as the present wall is higher now, he was not bound to allow this because the same quantity of water would be falling with

greater force. In support of this theory, the defendant has cited the rulings reported in Suresh Chandra v. Jogendra Nath AIR 1920 Cal. 268 and

Keshrisahai Singh v. Ajit Narayan Singh AIR 1920 Pat. 689. In principle, an easement-holder cannot increase the burden on the servient

tenement; if he does, he would lose the easement right as he has rendered himself incapable of enjoying it in the original manner. But whether the

burden has really been increased is a question of fact. It is doubtful if this burden is really increased merely by the fact of the wall being raised to a

greater height, without increasing the total roof surface and without altering the manner in which the water drops. But all this would have come up

for consideration if the third alternative had been established, that the intervening passage was the property of the defendant subject to the

plaintiff''s easement. All the foregoing discussion shows that it is not so, and therefore, it is unnecessary to examine the question further.

In the result, the plaintiff''s appeal is allowed, the judgment and decree of the first appellate Court are set aside and the judgment and decree of the

trial Court are restored to the extent that the intervening strip just as it was found to exist at the time of the suit (i.e. 37'''' x 27'''') is the joint property

of the parties and is to be used by them as abchuk or the drain for water falling from the roofs. The defendant is permanently restrained from

interfering with this. Costs and pleaders fee throughout payable by the defendant-respondent to the plaintiff-appellant according to rules.