

Court No. - 19

Case :- SECOND APPEAL No. - 537 of 1989

Appellant :- Ram Pher And Others.

Respondent :- Asha Devi

Counsel for Appellant :- M.C. Shukla,A.N. Bhargava,D.P. Gupta,Mohd Adil Khan,P.K. Sharma,P.L. Mishra,S. Bhargava,S.K. Verma,Sunder Lal

Counsel for Respondent :- H.S.Sahai,U S Sahai

Hon'ble Jaspreet Singh,J.

1. Heard Shri Mohd. Arif Khan, learned Senior Counsel alongwith Shri Akbar Ali Khan for the appellants and Shri Sarashwat Srivastava, holding brief of Shri U. S. Sahai, learned counsel for the respondent.

2. This is the plaintiff's second appeal assailing the judgment and decree passed by the Lower Appellate Court dated 26.07.1989 passed in Appeal No. 220 of 1983 whereby it set aside the judgment and decree passed in Suit No. 147 of 1981 dated 11.05.1983, as a result, the suit of the plaintiff which was partly decreed by the Trial Court was dismissed in its entirety by the Lower Appellate Court.

3. The instant second appeal was admitted by this Court by means of order dated 14.08.1989, however, at the relevant time no substantial question of law was framed, however, on an application moved by the appellant seeking interim relief, the Court had directed the parties to maintain status-quo. Later, this Court by means of order dated 18.09.2023 framed a solitary question of law which reads as under:-

“(i) Whether the Lower Appellate Court was justified in dismissing the suit which was decreed by the Trial Court in part and the evidences have not been appropriately appreciated?”

4. In order to appreciate the controversy involved in the instant appeal, facts giving rise to the same are being noticed hereinafter and for the sake of convenience, the Court shall be referring to the parties as they were originally impleaded in the suit.

5. Ram Pher along with Ram Pyare and Gauri Shankar instituted a suit bearing No. 147 of 1981 for permanent injunction against Brijlal, the defendant. Initially it was pleaded that the plaintiffs are the owner in possession of the disputed property which was shown by red colour in the site plan annexed and forming part of the plaint in suit.

6. It was stated that the father of the plaintiff had given some land to the defendant who thereafter had raised constructions and was residing in the same, however, at a later point of time in the month of March, 1981, the southern wall of the defendant's house had collapsed and the defendant instead of raising the boundary wall at the same place where it was first located, he tried to encroach upon the land belonging to the plaintiff in order to raise construction of the southern wall encroaching some part of the plaintiff's land. This gave the cause of action for the plaintiff to file his suit seeking permanent injunction against the defendant.

7. During the pendency of the suit, the defendant had raised the entire construction and in the month of June, 1982, the defendant opened a door on the eastern wall, consequently, on 30th September, 1982, the defendant also encroached upon the land belonging to the plaintiff. This prompted the plaintiff to amend the plaint and also seek additional relief of mandatory injunction directing the defendant to remove the offending construction made during the pendency of the suit and putting the plaintiff back in

possession.

8. The defendant filed his written statement and denied the allegations in the plaint. The case of the defendant was that the property in question belonged to Smt. Janki and she was survived by her daughter Dheerja who was married to Bal Govind. Since Bal Govind did not have any property or farming land, accordingly, Janki invited Balgobind and settled him in Village Kohra, Majhra Jagannath Chaubey ka Purva, Pargana & Tehsil Amethi, District Sultanpur.

9. It was further stated that Brijlal, the defendant and his father Sheetlu were born in the house in question and as such the same was the property belonging to the defendant. It was also stated that the southern wall had collapsed and the defendant raised southern wall at the same place on his own property and the plaintiffs are incorrectly made allegations against the defendant of encroaching upon the land of the plaintiff.

10. It was also pleaded that the defendant also had a door on the eastern side and it is not as if that he had made a new construction over the eastern part nor he had encroached upon the land as alleged by the plaintiff on the eastern side and thus the suit was misconceived, accordingly, the defendants have been in possession of their own property as well as the land appurtenant both on the northern and the eastern side, hence, the suit was liable to fail.

11. The Trial Court framed eight issues, however, the primary issue on which the parties contested was :-

(i) whether the plaintiff was the owner and in possession of the disputed

property?

(ii) Whether the disputed property was capable of demarcation?

12. The parties led their evidence and the Trial Court while dealing with the first issue considering the oral evidences recorded a finding that in so far as the claim of the plaintiff regarding encroachment made by the defendant while raising the southern wall is concerned, the same was not made out and the suit for the said relief was dismissed, however, the Trial Court found that in so far as the claim regarding opening of the door on the eastern wall is concerned, it found that earlier when a commission was sent to inspect the property, the door was not there, however, the Presiding Officer of the Trial Court also inspected the property in question on 08.05.1983 and it found that the door affixed on the eastern wall appeared to be recent and that on the eastern side there was a mound of mud which indicated that some digging had taken place recently and the said mud had collected and the Trial Court also noticed that the said mound related to the demolished old structure over which the new structure/wall had been raised, as a result, the sehan of the plaintiff on the northern side of his house, which was on the eastern part from the defendant's house, had been encroached and for this relief the suit was decreed on 11.05.1983 directing the defendants to handover the possession of the eastern part to the plaintiff within two months and demarcated the land 18x12 from south-east to the north-east portion as shown in the map prepared by the Commissioner bearing Paper No. Ga-13 which was also made a part of the decree.

13. Two appeals came to be filed against the judgment and decree passed by the Trial Court dated 11.05.1983. The appeal whereby part claim of the

plaintiff was dismissed was registered as Regular Civil Appeal No. 220 of 1983 and one appeal filed by the defendant whereby the defendant was aggrieved regarding handing over the possession of 18x 12 hand (as a unit of measurement) and shown in the map annexed with the decree. This appeal was registered as R.C.A No. 197 of 1983. Both the appeals were connected and heard together and came to be decided by a common judgment dated 26.07.1989 whereby the First Additional Civil Judge, Sultanpur dismissed the appeal preferred by the plaintiff bearing No. 220 of 1983 and allowed the defendant's appeal bearing No. 197 of 1983, as a result, the suit of the plaintiff which was partly decreed by the Trial Court was dismissed in its entirety by the First Appellate Court.

14. It is being aggrieved against the said judgment and decree dated 26.07.1989 that the plaintiffs came before this Court in the instant second appeal.

15. The learned Senior Counsel for the appellant has submitted that there was ample material available on record to indicate that the defendant had made a door recently on the eastern side and later by taking the benefit thereof he encroached upon the sehan land of the plaintiff and dispossessed the plaintiff. The sehan of the plaintiff was found on the northern side which fell on the eastern side of the defendant's house whereas the defendant had his sehan on the northern side of his own home and thus this aspect and the evidence has not been appropriately considered by the Lower Appellate Court.

16. It is also submitted that the Presiding Officer of the Trial Court had also visited the property in question and found that the door affixed by the

defendant on his eastern wall was recently made. This supported the claim of the plaintiff. The mound of mud which was found at the site also indicated that the defendant had removed the earlier structure which did not have any door and raised new construction affixing the door thereby making his ingress and egress on the eastern side which in turn disturbed the exclusive right of the plaintiff to use his sehan which was appurtenant to his house and beneficial for the enjoyment as the plaintiffs utilized the same for tying cattle, drying cow dungs, keeping agricultural implements and for their own sitting.

17. The Lower Appellate Court misread the evidence on record and returned findings which were not supported with the evidence so available, hence, the judgment and decree passed by the Lower Appellate Court was bad in the eyes of law and as such the appeal deserves to be bad.

18. Sri Shaswat Srivastava, learned counsel appearing under authority of Sri U.S. Sahai has submitted that from the bare perusal of the map which was prepared by the Commissioner would indicate and including the one which was annexed with the plaint in suit after the plaint was amended that the disputed portion has been shown on the eastern side by the red colour lines and by letters Sa, Cha, Chha, Ra, Va, Fa.

19. It is stated that thereafter there is a portion which has been shown by the dotted lines which from the evidence available on record indicates was a pathway which also had a small drain for flowing of water (Nabhdan) which was in the north-south direction from the house of the defendant and then turned in the south-west direction and this was in the north of the house of the plaintiff.

20. It is urged that since the land of the plaintiff which he claims to be his sehan is on the northern side of the plaintiffs house and this was demarcated by this Nabhdan (small drain) and in so far as the eastern wall of the defendant is concerned, the same had already been raised prior to the institution of the suit including the door and the defendants were enjoying their property to the exclusion of the plaintiff including the right to use the pathway which was shown by the dotted lines.

21. The plaintiff and his witness also clearly admitted these facts and in the aforesaid circumstances, it cannot be said that the defendant had encroached upon any land of the plaintiff which they were required to handover to him. Moreover, the plaintiff despite amending his plaint did not give any particulars regarding the extent of his sehan or the extent of the alleged land which was encroached by the defendant and merely by making wild allegations, the suit could not have been decreed as the plaintiff has to stand on his own legs and strength of his evidence and this aspect has been considered by the Lower Appellate Court while dismissing the suit.

22. In so far as the claim of the plaintiff regarding the southern part is concerned, the same did not find favour with the Trial Court as well as the Lower Appellate Court and in any case was concluded by concurrent findings of fact which were not liable to be disturbed in exercise of powers under Section 100 C.P.C.

23. Sri Srivastava, learned counsel has further pointed out from the evidence on record to suggest that the plaintiff and his witness had clearly indicated that the land in question was in the occupation of the defendant

and they were in its possession for decades over and there was nothing to suggest that any encroachment was made by the defendant where the plaintiff himself failed to establish his own case, no benefit can be derived by the plaintiff by resorting to culling out sentences from the deposition which is not the appropriate method of evaluation of evidence on record and thus the Lower Appellate Court after making a thorough examination of the evidence of both the plaintiff and the defendant witness has recorded findings which are pure findings of fact which are not liable to be disturbed in exercise of powers of second appeal, consequently, the appeal deserves to be dismissed.

24. The Court has heard the learned counsel for the parties and also perused the material on record.

25. Apparently, the claim of the plaintiff is raising of the wall on the southern side by extending the boundaries by the defendant and in garb thereof encroaching some part of the land of the plaintiff.

26. The other related to the opening of the door which opened in the sehan of the plaintiff and in September, 1982, allegedly the defendant ousted the plaintiff from the land shown by letters Sa, Cha, Chha, Ra, Va, Fa.

27. From the perusal of the map which the plaintiff annexed after the amendment with his plaint indicates that the house of the plaintiff was on the extreme south. On the western side was the house of the Tulsiram. On the north-west side was the sehan of Tulsiram thereafter Sariya of Rajaram is shown.

28. After some open space, the house of the defendant has been shown and the sehan of the defendant has been indicated on the northern side. The plaintiff has shown his sehan on the northern side of his own house and it extends right to the extreme north where the plaintiff is said to have his tubewell on the north-eastern side with a room and also sariya belonging to the plaintiffs.

29. In order to establish his case, the plaintiff examined his witness namely Sri Jiyalal as P.W. 1 and the plaintiff no. 1 himself namely Ram Pher examined himself as P.W. 2. Both the Trial Court as well as the Lower Appellate Court after noticing the evidence of Jiyalal categorically recorded a finding that in so far as the first claim of the plaintiff is concerned, the same was not established, inasmuch as, the case of the plaintiff that the defendant had raised a boundary wall on the southern side by encroaching the land of the plaintiff does not appear to be correct for the reason that in the map as well as as per the evidence of the said witness, it was clearly established that the house of the plaintiff was on the extreme southern side and in north thereof there was the sariya of the plaintiff, sariya of Rajaram, sehan of Tulsiram and after some more open space was the house of the defendant.

30. Even if at all, the defendant had raised his wall on the southern side yet it could not have encroached upon the land of the plaintiff since from the evidenc of both Jiyalal and Rampher after the house of the defendant on the southern side there was the Nabhdan of Tulsiram.

31. It is not disputed that the defendant was residing in his house and his southern wall had collapsed which he had erected. There was nothing to

bring on record as to how the plaintiff could claim the land as his own, inasmuch as, there was the Nabhdan of Tulsiram, sariya of Rajaram intervening and in no circumstance the land of the plaintiff was being affected in so far as the southern boundary wall raised by the defendant is concerned. Since this finding is recorded and concurrently affirmed by the Lower Appellate Court as well after scrutinizing the oral evidence of both the plaintiff-witness and that of Rampher the plaintiff no. 1 which corroborates the status as shown in the site plan which has been annexed with the amended plaint and also shown in the map annexed with the decree, hence, this Court does not find that there is any error committed by the two courts in so far as the first claim is concerned which is also affirmed by this Court.

32. Now, the only issue which is left is to consider as to whether the defendant and made opened a new door on the eastern wall which opened in the sehan of the plaintiff and in September, 1982, the defendant ousted the plaintiff from the same.

33. In so far as this aspect is concerned, the Trial Court primarily relied upon its inspection report as the Presiding Officer had made an inspection on 08.05.1982 and it found that the door affixed on the eastern side was apparently a new fixture and that the mound of mud appeared to be relating to some old structure.

34. It also noticed that since the tubewell of the plaintiff is on the north-eastern side and intervenes between the house and sehan of the plaintiff, hence, the said land also vested with the plaintiff and appeared to be for his beneficial use. Since the defendant already had a sehan on his northern

side, apparently, it also gave credence that the defendant has opened a new door on the eastern side which has the effect of encroaching upon the land of the plaintiff and considering the same, the Trial Court directed that the defendant would handover the possession to the plaintiff within two months on the eastern portion measuring 18/12 hands (unit of measurement) from the southern-eastern portion to north-eastern portion and also made the Commissioner's map bearing paper No. Ga-13 as part of the decree.

35. This was noticed by the Lower Appellate Court and it scrutinized the evidence of the plaintiff and his witness threadbare and recorded findings that first and foremost the plaintiff has not indicated in his plaint that how much land was available with the plaintiff and how much land has been encroached upon by the defendant on 30th September, 1982. In absence of any proper dimensions, the claim of the plaintiff was quite vague and uncertain.

36. The Lower Appellate Court thereafter noticed the statement of Jiyalal who was examined as P.W. 1 and held that it was admitted that about 15 years ago the defendant had re-constructed his eastern wall and had opened the door on the eastern side. He also gave an estimation of the area of the defendant property by stating that it was 24 to 25 hands (unit of measurement) on the north-south and 15 to 16 hands on east-west. He admitted that the defendant Brijlal was in possession of the same.

37. In contradiction to the same, Rampher who was examined as P.W. 2 could not give any dimensions of the sehan. Neither could he state that what was the extent of the entire property. No effort was made by the plaintiff to get a survey conducted.

38. The Lower Appellate Court also noticed that in the statement of P.W. 1 that Rampher the plaintiff had about 8 to 9 biswa of his as Abadi which included the area of the defendant's house. He also stated that the land which was given to the defendant Brijlal, he had his possession on the eastern side as well and that Brijlal had removed the eastern wall about 15 years ago, reconstructed the same and opened a door on the eastern side about 15 years ago.

39. The P.W. 1 also admitted that the defendant had his entrance door from the northern as well as from the eastern side and that he had seen the situation as such since last many years and decades. This was also considered in contrast with the statement of Rampher himself who was examined as P.W. 2 and it was stated that the defendants were residing in the village since last 25 to 26 years. He also gave a statement that the land which was given to the defendant was about 19 to 25 hands in length and it was 7 to 8 hands wide.

40. He also admitted that the defendant had raised new constructions in the year 1982 and his southern wall was also raised where earlier the wall existed. The plaintiff Rampher in his cross-examination further stated that there is a pathway which is about 3 hands wide and this pathway existed since the time plaintiff Rampher had gained worldly sense.

41. It is considering the aforesaid that the Lower Appellate Court found that where the plaintiff himself could not establish his own case nor could give the area with specific dimensions or with clarity and also in his own map had shown a pathway which was admitted to exist prior to the time when the plaintiff had regained worldly sense which clearly demarcated or

created a differential portion between the eastern wall of the defendant and the land as alleged by the plaintiff, hence, the case of the plaintiff was not proved.

42. Apparently, the Lower Appellate Court after examining the evidence of the plaintiff and his witness did not find favour with the findings recorded by the Trial Court regarding the claim made by the plaintiff for the eastern side of encroachment, it allowed the defendant's appeal and dismissed the plaintiff's appeal.

43. These are pure findings of fact which have been recorded by the Lower Appellate Court after scrutinizing the evidence and as such the same cannot be termed to be perverse.

44. It will also be relevant to notice that taking a holistic view, this Court finds that once the Lower Appellate Court has taken note of entire evidence and has recorded a finding of fact and it has given reasons for disagreeing with the finding recorded by the Trial Court, the same is binding on this Court unless it can be shown that it is perverse.

45. Merely because upon appreciation, another view may be possible but that is not sufficient for this Court to ignore the finding of fact which has been recorded by the Lower Appellate Court based on sound appreciation of evidence.

46. In this regard, the observations of the Apex Court in ***Gurnam Singh Vs. Lehna Singh; 2019 (7) SCC 641*** will be relevant to notice which is being re-produced for the ease of reference:-

"14. When a substantial question of law can be said to have arisen, has been dealt with and considered by this Court in Ishwar Dass Jain [Ishwar Dass

Jain v. Sohan Lal, (2000) 1 SCC 434] . In the aforesaid decision, this Court has specifically observed and held: (SCC p. 437)

“Under Section 100 CPC, after the 1976 Amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered, would have led to an opposite conclusion. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In either of the above situations, a substantial question of law can arise.”

19. Before parting with the present judgment, we remind the High Courts that the jurisdiction of the High Court, in an appeal under Section 100 CPC, is strictly confined to the case involving substantial question of law and while deciding the second appeal under Section 100 CPC, it is not permissible for the High Court to reappraise the evidence on record and interfere with the findings recorded by the courts below and/or the first appellate court and if the first appellate court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in second appeal. We have noticed and even as repeatedly observed by this Court and even in Narayanan Rajendran v. Lekshmy Sarojini [Narayanan Rajendran v. Lekshmy Sarojini, (2009) 5 SCC 264 : (2009) 2 SCC (Civ) 500] , despite the catena of decisions of this Court and even the mandate under Section 100 CPC, the High Courts under Section 100 CPC are disturbing the concurrent findings of facts and/or even the findings recorded by the first appellate court, either without formulating the substantial question of law or on framing erroneous substantial question of law.”

47. The dispute in between the parties regarding the boundaries and encroachment which has been considered by the Lower Appellate Court after noticing the evidence is a pure finding of fact which this Court is loath to intervene and disturb.

48. In view of the aforesaid, this Court does not find that there is any merit in the appeal which is accordingly dismissed. The judgment and decree passed by the Lower Appellate Court dated 26.07.1989 in Regular Civil Appeal No. 220 of 1983 is affirmed. In the facts and circumstances, there shall be no order as to costs. The records of the Trial Court be returned forthwith.

(Jaspreet Singh, J.)

Order Date :-30th October, 2023/Asheesh