

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

THURSDAY, THE 28TH DAY OF MAY 2015/7TH JYAISHTA, 1937

RSA.No. 564 of 2011 ()

AGAINST THE JUDGMENT AND DECREE IN AS NO. 140/2004 of SUB COURT, OTTAPPALAM
DATED 26-02-2011

AGAINST THE JUDGMENT AND DECREE IN OS NO.231/2003 of MUNSIF COURT,
OTTAPPALAM DATED 31-07-2004

APPELLANT(S)/RESPONDENT/DEFENDANT:

RAMACHANDRAN @ RAMAN, AGED 64 YEARS,
S/O.EDATHODI KRISHNAN, MUNDAMUKA AMSOM DESOM
OTTAPALAM TALUK, GANESHGIRI POST, SHORNUR-679123

BY ADVS.SMT.T.D.RAJALAKSHMI
SRI.R.SREEHARI

RESPONDENT(S)/APPELLANT/PLAINTIFF:

JANARDHANAN, AGED 60 YEARS,
S/O.EDATHODI KUMARAN, MUNDAMUKA AMSOM DESOM,
OTTAPALAM TALUK
GANESHGIRI POST, SHORANUR-679123

BY ADV. SRI.T.SETHUMADHAVAN
BY ADV. SRI.KODOTH PUSHPARAJAN
BY ADV. SRI.K.JAYESH MOHANKUMAR
BY ADV. SMT.VANDANA MENON
BY ADV. SMT.ANJU P.NAIR

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON
28-05-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

A.HARIPRASAD, J.

R.S.A. No.564 of 2011

Dated this the 28th day of May, 2015

ORDER

Challenge in this second appeal is against the judgment and decree passed by the learned Subordinate Judge, Ottapalam in A.S.No.104 of 2004, an appeal arising from a suit for damages.

2. Pleadings, in brief, are as follows: Admittedly the plaint schedule property belongs to the plaintiff/respondent. At the time of suit, he was residing in a RCC house in the plaint schedule property. Originally it was a house with tiled roof. With due permission from the authorities, the respondent changed the roof to RCC. Appellant's property is situated on the western side of the respondent's property and both are separated by a public road in between. The distance between the western wall of the respondent's house and the well in the appellant's property is 6.9 metres. In between, there is a public road having a width of four metres. The respondent and the appellant were at loggerheads. It is the case of the respondent that on 12.04.2003, the appellant explored the rocks inside his well by using explosives causing damage to the walls of respondent's house. Cracks were developed in the western wall of the respondent's house. Therefore, he claimed damages from the appellant.

3. The appellant opposed the suit by contending that he did not blast rocks in the well as alleged in the plaint. He only cleaned the well during the summer and no explosives were used. The appellant would contend that the respondent constructed the house without taking precautions for loading it with a RCC roof. The original tile roof was converted into a RCC roof on a building where no lintel was provided and that is the reason for the development of cracks in the walls. No act on the part of the appellant caused the damage, contended the appellant.

4. The trial court after examining the respondent/plaintiff, the appellant and an expert engineer, dismissed the suit finding that the respondent failed to prove that the defendant blasted rocks in the well and also that the cracks were developed due to the flaws in construction. The respondent took up the matter in appeal before the Subordinate Judge. After reappreciating the evidence, the first appellate court reversed the judgment and decree of the trial court and decreed the suit.

5. Heard the learned counsel for the appellant/defendant and the respondent/plaintiff.

6. Learned counsel for the appellant contended that the lower appellate court did not consider the fact that no evidence is available on the record to show that there was blasting of rocks in the well using explosives as alleged by the respondent. According to the averments in the plaint and testimony of PW1, the incident of blasting occurred on 12.04.2003. The suit

was filed only on 09.06.2003. Learned counsel for the appellant contended that there is no material except the ipse dixit of the respondent to show that there was blasting. No independent witness was examined. Even though PW1 has stated that he had filed a complaint before Police against the appellant for using explosives unauthorisedly, no evidence was adduced to support that contention. If the allegation against the appellant was that he used explosives without any authority, it may amount to a grave offence under the relevant statute. Non-production of any evidence in this regard is an improbability affecting the strength of the respondent's case. The fact that the suit was filed only on 09.06.2003 is also commended upon by the learned counsel for the appellant. In answer to this contention, learned counsel for the respondent contended that notices were issued before institution of the suit and that is why the suit was filed after two months from the date of incident.

7. Another improbability highlighted by the counsel for the appellant is that in spite of filing the suit on 09.06.2003 and getting a commissioner appointed to inspect the property urgently, the respondent did not take any step to take the commissioner to the place and point out the alleged blasting which caused the damage. On 20.08.2003 the commissioner had filed an interim report in the case informing the court that in spite of giving notices on two times, the respondent/plaintiff did not co-operate to have an inspection of the property. Only on 26.11.2003 the

commissioner could inspect the property. By that time, nearly seven months have expired from the date of the alleged incident and five months from the date of suit. On going through the commissioner's report and report of CW1, I am unable to find any material to show that rocks in the well were blasted as alleged in the plaint on 12.04.2003.

8. The appellant has a consistent case that cracks were developed in the building for multiple reasons. According to him, heavy traffic through the public road abutting the respondent's house caused vibration to the building which is otherwise a weak structure. That apart, there is a railway track adjacent to the property which also caused damage to the building. Even though the lower appellate court repelled these contentions in the absence of any valid reason to find that cracks must have been developed due to blasting in the well by the appellant, I am of the view that the probabilities discernible from the appellant's case cannot be ruled out. The trial court had considered these aspects in great details. It had the advantage of seeing the witness. On going through the judgment of the trial court and that of the first appellate court, I am of the view that the lower appellate court erred in reversing the finding of the trial court, which is more probable in the facts and circumstances. It is settled law that if a view taken by the trial court is reasonable and it derives support from the materials on record, the appellate court should be loathe in reversing it on the reason that another view is also possible. The preponderance of

probabilities in this case, especially in the absence of any valid reason to hold that the appellant blasted rock in the well by using explosives is in favour of the appellant. Therefore, I find that the reversal of the trial court's judgment and decree by the lower appellate court is illegal and it was perverse appreciation of evidence.

In the result, the appeal is allowed. The decree passed by the Subordinate Judge, Ottapalam in A.S.No.140 of 2004 is set aside and that of the trial court is restored. There is no order as to costs.

All pending interlocutory applications will stand closed.

A. HARIPRASAD, JUDGE.

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