

HIGH COURT OF CHHATTISGARH AT BILASPUR**Second Appeal No. 290 of 2007**

Madanlal Dewangan, S/o Late Shri Ramji Dewangan,
Aged about 60 years, R/o Dewangan Mohallah
Krishna Nagar, Ward No. 26, House No. 226 Juna
Bilaspur, P.O. Tahsil and Distt. Bilaspur,
Bilaspur, Chhattisgarh.

---Appellant/Plaintiff

Versus

1. Shri Anand Kumar Dewangan, S/o Late Shri Sadhuran Dewangan, Aged about 49 years, R/o Raj Kishore Nagar, In front of house of Shri Vijay Kumar Development Office, Raj Kishor Nagar, Bilaspur, P.O. Tahsil and Distt. Bilaspur, Chhattisgarh.
2. Shri Ramesh Kumar Dewangan, S/o Late Shri Sadhuran Dewangan Mohallah, Krishna Nagar Ward No. 25, House No. 227, Juna Bilaspur, P.O. Tahsil and Distt. Bilaspur, Chhattisgarh.
3. Shri Chhannulal Dewangan, S/o Late Shri Sadhuran Dewangan, Aged about 43 years, R/o New Sarkanda, Behind Jora Talab, Kapil Nagar, P.O. Tahsil and Distt. Bilaspur, Chhattisgarh.
4. Shri Manoj Kumar Dewangan, S/o Late Shri Sadhuran Dewangan, Aged about 39 years, R/o Sharda Typing Centre, In front of State Bank Juna Bilaspur, P.O. Tahsil and District Bilaspur, Chhattisgarh.

--- Respondents/Defendants

For Appellant	:-	Mr. Ram Kumar Tiwari, Advocate
For Respondents	:-	Mr. Ravindra Agrawal, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal
Judgment on Board

21/01/2020

1. This second appeal preferred by the appellant/plaintiff was admitted for hearing on the following substantial question of law :-

“Whether the first appellate Court was justified in reversing the judgment and decree of the trial Court by recording a finding, which is perverse to the record?”

(For the sake of convenience, parties would be referred hereinafter as per their status and ranking shown in the suit before the trial Court.)

2. Plaintiff's father Ramji Dewangan and defendants' father Sadharam Dewangan, both were brothers. The suit house was partitioned between Ramji Dewangan and Sadharam Dewangan vide memorandum of partition dated 22/03/1970 (Ex. P/1) with which a map is also attached. The dispute between the parties relates to removal of wall from the place 'द' shown in the plaint map and to re-open the door of the northern side of the suit house as shown in place 'ड' and also to re-open the window in place 'र' shown in the plaint map.

3. Plaintiff instituted a suit for mandatory injunction stating *inter alia* that the suit house

was partitioned between the parties vide Ex. P/1 and since then, they have been in possession of their respective shares of the suit house. It is the case of the plaintiff that in the northern side of the house, there was a common space admeasuring 16x4 feet for their nistari rights, drainage and for cleaning by sweepers which is shown as 'अ', 'ब', 'स' and 'ड' in the plaint map. In the month of July, 1998, plaintiff opened a window over the place 'र' and constructed a septic toilet in place of kaccha toilet. On 21/10/2003, defendants have closed that common space by erecting a wall at the place 'द' and also closed the window in place 'र' and thereby, the access of sweepers for cleaning the toilet is thus, obstructed and plaintiff is restrained from using the common space and light and air.

4. Defendants opposed by stating that plaintiff is not entitled for any relief claimed by him in the plaint as he constructed the septic toilet over their part of the common space in the year 1998 without their consent.

5. Learned trial Court, by its judgment and decree dated 20/03/2006, decreed the suit of the plaintiff and directed the defendants to remove

the wall constructed in place 'द' and to open the door at place 'ड' and window at place 'र' shown in the plaint map.

6. On appeal being preferred by the defendants, learned first appellate Court, by its judgment and decree dated 12/01/2007, allowed the appeal and reversed the judgment and decree of the trial Court by dismissing the suit of the plaintiff against which this second appeal under Section 100 of the CPC has been preferred by the appellant/plaintiff in which substantial question of law has been formulated and set out in the opening paragraph of this judgment.

7. Mr. Ram Kumar Tiwari, learned counsel for the appellant/plaintiff would submit that the first appellate Court has unnecessarily ignored the evidence on record and reversed the well-reasoned judgment and decree passed by the trial Court by recording a finding which is perverse and contrary to record, as such, the judgment and decree of the first appellate Court deserves to be set aside and the second appeal deserves to be allowed.

8. Mr. Ravindra Agrawal, learned counsel for the respondents/defendants would support the impugned

judgment and decree passed by the first appellate Court and would submit that by passage of time, the parties have settled their dispute and at present, the plaintiff is not residing at his house and is residing at Bhilai since last so many years and the relationship between the parties has now become cordial, therefore, the second appeal deserves to be dismissed.

9. I have heard learned counsel for the parties, considered their rival submissions made hereinabove and went through the records with utmost circumspection.

10. Plaintiff — Madanlal Dewangan, in his statement (P.W. 1), has clearly admitted that there was no window at place 'र' and it was constructed by the plaintiff in the year 1998. He has also stated therein that there was a kaccha toilet which was later converted by him into a septic toilet in the year 1998 and the defendants have erected a wall at place 'र' which was there at the time of partition vide Ex. P/1.

11. From a careful perusal of the memorandum of partition (Ex. P/1), it is quite vivid that there was no such window at the time of partition at place 'र' which has also been admitted by the

plaintiff in his statement P.W. 1 that the said window was constructed by him in the year 1998, therefore, it is established that the window has been opened by the plaintiff after partition took place and that too without consent of the defendants which the trial Court did not notice, but the first appellate Court has noticed the said fact and has rightly set aside the decree of the trial Court to that extent, but so far as the erection of common wall at place 'द' shown in the plaint map is concerned, it is the admitted position on record that there was no wall existing at the time of partition in the year 1970 and it has been erected by the defendants in the year 1998 though for some privacy and practical purpose, but yet it did not exist at the time of partition and that wall blocks the passage as it is used by sweepers to clean the toilet constructed therein, as such, the first appellate Court has erred in interfering with the decree of the trial Court in this respect.

12. In my considered opinion, learned first appellate Court was justified in reversing the finding of the trial Court with regard to issue No. 4, but absolutely unjustified in interfering with the

findings recorded by the trial Court with regard to issues No. 3 and 6.

13. Consequently, the judgment and decree of the first appellate Court is partly set aside to the extent of issues No. 3 and 6 and that of the trial Court is restored to that extent, whereas the judgment and decree of the first appellate Court is maintained with respect to issue No. 4.

14. Accordingly, the second appeal is allowed in part leaving the parties to bear their own cost(s).

15. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Harneet