

Hari Chand Alias Harish Chandra

Vs

Daulat Ram

Civil Appeal No. 755 of 1971

(A. P. Sen, B. C. Ray JJ)

15.10.1986

JUDGMENT

B.C. RAY, J. -

1. This appeal by special leave is against the Judgment and decree dated December 21, 1970 of the Allahabad High Court in Second Appeal No. 2757 of 1963 allowing the appeal and setting aside the judgment and decree of the court of appeal below and dismissing the plaintiff's suit.

2. The plaintiff Hari Chand alias Harish Chandra instituted Suit No. 610 of 1961 in the court of the Munsif, Agra for recovery of possession of the disputed land shown in red colour attached to the plan marked with letters GCDH on demolition of the unauthorised constructions made thereon by the defendant alleging inter alia that the plaintiff became owner in possession of a piece of land measuring 1580 sq. ft. situated at Sultanpur, Agra Cantt. designated as No. 164-A, and shown in the plan attached thereto with letters A, B, C, D, E, F on the basis of a registered sale deed dated May 9, 1961, from Ramji Lal owner of the said property. It has been further alleged that the plaintiff started to build a compound wall over and around his land after his purchase. The defendant taking undue advantage of the plaintiff's temporary absence from Agra, wrongfully encroached and trespassed along the whole Northern length of the plaintiff's land measuring North to South about 4 ft. and East to West about 6 1/2 ft. by hurriedly raising a low mud wall and extending his khaprail thatch over it. It has been shown in the attached plan in red colour with letters G, C, D & H. It has been further alleged that in spite of plaintiff's objection against the said wrongful encroachment and trespass the defendant did not pay any heed to it. It has also been pleaded that the cause of action of the suit primarily arose on or about May 22, 1961 when the defendant made the encroachment and wrongful constructions over the plaintiff's land as well as it arose on June 4, 1961 when the defendant failed to remove the encroachment in spite of the plaintiff's notice. Hence this suit has been instituted.

3. The defendant filed a written statement denying that the plaintiff was owner of the land shown by GCDH in the plan attached to the plaint. The defendant also denied the correctness of the sale deed dated May 9, 1961. It has been stated that the land marked GCDH as shown in red colour in the plan attached to the plaint never belonged to the plaintiff. The wall and khaprail belonging to the contesting defendant have been existing at their present site since time immemorial. The plaintiff's allegation that the contesting defendant has constructed the wall and extended the khaprail (tiled roof) in May 1961 is totally wrong and baseless. It has been further stated that he did not make any new construction. The defendant also stated that the plaintiff illegally tried to remove his kuccha wall and the tiled roof situate at the place marked G, C, D & H. Accordingly, on May 25, 1961 the contesting defendant gave a notice to the plaintiff mentioning the actual facts to which he gave a wrong reply. The plaintiff's allegation that the wall and tiled roof of the defendant encroach upon

the plaintiff's land is totally wrong, false and baseless. It has been stated that the wall and tiled roof belongs to the contesting defendant and the eaves of tiled roof have been at the same place since time immemorial where they are at present. He has been regularly and openly enjoying all the proprietary rights and rights of adverse possession in respect of the land aforesaid. Under Section 142 of the Limitation Act, the contesting defendant became the absolute owner of the land in dispute on the basis of the adverse possession as well and he has a right to easement in the form of flowing of water from the tiled roof. The kuccha house No. 164 belonging to the contesting defendant has been existing at its site exactly in the same condition in which it was built by the defendant's grandfather. The eaves have been dropped at that very place and the khaprail has also been existing at that very place. The contesting defendant did not make any new construction as alleged by plaintiff in the plaint. Property Nos. 163 and 164 consisted of kuccha houses. The contesting defendant demolished the property No. 163 which had come to his share and got it pucca built. Property No. 164 is a khaprail in which the contesting defendant is living and was living at the time of partition. The defendant therefore, states that the suit is liable to be dismissed.

4. Third Additional Munsif, Agra after hearing the parties and also on a consideration and appraisal of the evidences on record held that the plaintiff was the owner of the property described in the plaint by the boundaries but the defendant has not trespassed over his land and has not constructed a new wall or khaprail. It has been further held that the plaintiff failed to prove the case of trespass and encroachment. The suit was accordingly dismissed with costs.

5. Against this judgment and decree the plaintiff preferred an appeal being numbered as Civil Appeal 220 of 1963 in the court of District Judge, Agra. This appeal was allowed by the Second Additional Civil Judge, Agra holding that the defendant failed to prove that the wall in dispute and the khaprail existed for the last more than 12 years before the suit, even though it was not proved that the khaprail had been raised in May 1961 as was the case of the plaintiff, but they are recent construction. It was further held that even if the defendant's wall and khaprail are old ones he is not entitled to maintain them after the same was allotted to Ramji Lal in the deed of partition dated March 3, 1958. It has been further held that the plaintiff is entitled to possession after demolition of the construction of the portion found encroached by defendant. The judgment and decree of the court below was set aside.

6. Against this Judgment and decree Second Appeal No. 2737 of 1963 was filed before the High Court at Allahabad. This appeal was dismissed by judgment and order dated September 8, 1963 and the judgment and decree of the lower appellate court was affirmed.

7. A Review Application No. 269 of 1969 for the review of the said Judgment was filed before the High Court on the ground that the alleged partition deed dated March 17, 1963 was not in fact a deed of partition but merely an agreement between the parties to partition the property and there was no actual partition by metes and bounds. The defendant continued to remain co-owner and co-sharer of the property in suit. The decree passed in the said suit is neither possible nor permissible under the law. This review application was allowed by judgment and order dated December 9, 1970 setting aside the judgment dated September 8, 1969 and directing the appeal to be listed for further hearing. Accordingly on December 21, 1970 the appeal was heard by the learned Judge who held that the mere allotment of shares by the said deed of partition did not amount to partition by metes and bounds. The appeal of the defendant was allowed and the judgment and decree of the lower appellate court were set aside and the suit was dismissed.

8. Against this judgment and decree the instant appeal on special leave was filed by the plaintiff.

The learned counsel for the plaintiff tried to urge before us that the land is dispute marked as GCDH in the plan was allotted to the share of the plaintiff's vendor Ramji Lal in accordance with the deed of partition (Ex. 3/1) and shown in map (Ex. 3/2) effected between the parties on March 17, 1958 and this has been mentioned in the sale deed (Ex. 1) executed by Ramji Lal, one of the co-sharers of the property. It has, therefore, been submitted that the judgment and decree of the High Court is not in accordance with law and it should be set aside. This contention advanced on behalf of the plaintiff cannot be sustained inasmuch as there is no pleading in the plaint that the disputed property shown in red colour and marked as GCDH fell within the allotment of the plaintiff on the basis of the deed of partition executed in 1958 between the plaintiff's vendor Ramji Lal and his two other brothers - Daulat Ram and Bishambhar Nath. It has also been not pleaded that the disputed mud wall and the khaprail over it were all along in possession of his vendor before the sale of the said land measuring 1580 sq. ft. appertaining to property No. 164-A. The plaintiff's case is that he got possession of the land he purchased including the suit land on May 9, 1961 and the defendant illegally trespassed on the said portion of land marked in red colour in the plan attached to the plaint and hurriedly constructed a low mud wall and extended his khaprail thatch over it on May 22, 1961 and so the suit for recovery of possession of this land on demolition of the unauthorised construction put up by the defendant was brought. There is no pleading regarding the partition of the property No. 164 between Ramji Lal and his two brothers nor there is any pleading to the effect that the disputed mud wall with the khaprail on it was ever in possession of his vendor Ramji Lal before the sale of the land in question in favour of the plaintiff. On the other hand, the defendant strongly and categorically stated in his written statement that the mud wall alongwith khaprail were in existence there for a long time and he was living in the said khaprail to the knowledge of the plaintiff's vendor. He also denied that he made any new construction of the wall on May 22, 1961 as alleged by the plaintiff. He also stated that the wall and the tiled roof belonged to the defendant and the existence of the tiled roof had been at the same place in the same condition for a long time, long before the partition deed made in 1958. The defendant also stated in his written statement that more than twenty years before private partition took place amongst the defendant and his brothers Bishambhar Lal and Ramji Lal. Property Nos. 163 and 164 had come to his share. He demolished the property No. 163, and he made pucca construction therein. Property No. 164 is khaprail wherein the contesting defendant is living and was also living at the time of partition.

9. The plaintiff has examined three witnesses including himself and his vendor Ramji Lal. PW 1 Ramji Lal stated in his deposition that the portion shown in red in plan No. 36/A Ka came to his share and defendant Daulat Ram was never in possession of this red portion after partition. It was also his evidence that at the time of sale, wall belonging to Daulat Ram did not exist over the portion showed in red colour. In cross-examination he said that there was a tiled shed towards the north of the land in dispute. Daulat Ram used to live therein. All these three portions had old tiles. There was a chhappar over the portion shown in red. Tiled roof was made after the fire accident. It happened about 28 years back. The land in dispute has been affected by salt and the adjoining kuccha walls have also been affected by salt. PW 2 Harish Chandra, the plaintiff, stated in his evidence that he was not present at the time encroachment was made by constructing a wall. Some persons told him about the extension of the wall. On cross-examination he stated that pucca rooms belonging to Daulat Ram stand at No. 163. He cannot say if they have been in existence 15-20 years. It is the evidence of defendant Daulat Ram, DW 1, that the wall in dispute has been in its place since the time he attained the age of discretion. There has been tiled roof for the last about 28 years. Before that there was a thatched shed. It is also his evidence that his mother effected partition about 28 years back. The wall in dispute was in existence when this partition was effected. It has been existing in the same condition since then. He also stated in cross-examination that he did not

affix his thumb impression on the plan prepared at the time the partition deed was executed. No measurements were done at the time the plan was prepared. DW 2 Khunni Lal a retired overseer stated in cross-examination that he had given his opinion that the wall in dispute belonged to Daulat Ram and that the flow of its water on the southern side was reasonable.

10. On a consideration of these evidences it is quite clear that the disputed kuccha wall and the khaprail over it is not a new construction, but existed for over 28 years and the defendant has been living therein as has been deposed to by Ramji Lal vendor of the plaintiff who admitted in his evidence that the land in dispute and the adjoining kuccha walls had been affected by salt and the chhappar over the portion shown in red was tiled roof constructed about 28 years back. This is also supported by the evidence of the defendant, DW 1, that the wall in dispute was in existence when the partition was effected i.e. 28 years before. On a consideration of these evidences the trial court rightly held that the defendant had not trespassed over the land in question nor he had constructed a new wall or khaprail. The trial court also considered the report 57-C by the court Amin and held that the wall in question was not a recent construction but it appeared 25-30 years old in its present condition as evident from the said report. The suit was therefore dismissed. The lower appellate court merely considered the partition deed and map Exs. 3/1 and 3/2 respectively and held that the disputed property fell to the share of the plaintiff's vendor and the correctness of the partition map was not challenged in the written statement. The court of appeal below also referred to Amin's map 47-A which showed the encroached portion in red colour as falling within the share of plaintiff's vendor, and held that the defendant encroached on this portion of land marked in red colour, without at all considering the clear evidence of the defendant himself that the wall and the khaprail in question existed for the last 28 years and the defendant has been living there all along. PW 1 Ramji Lal himself also admitted that the wall existed for about 28 years as stated by the defendant and the kuccha walls and the khaprail has been affected by salt. The lower appellate court though held that PW 1 Ramji Lal admitted in cross-examination that towards the north of the land in dispute was the khaprail covered room of Daulat Room in which Daulat Ram lived, but this does not mean that the wall in dispute exists for the last any certain number of years, although it can be said that it is not a recent construction. Without considering the deposition of defendant 1 as well as the report of the Amin 57-C the Second Additional Civil Judge, Agra wrongly held that the defendant failed to prove that the wall in dispute and the khaprail existed for the last more than 12 years before the suit. The Civil Judge further held on surmises as "may be that the wall and khaprail have not been raised in May, 1961 as is the plaintiff's case, but they are recent constructions". This decision of the court of appeal below is wholly incorrect being contrary to the evidences on record.

11. On a consideration of all the evidences on record it is clearly established that the alleged encroachment by construction of kuccha wall and khaprail over it is not recent construction as alleged to have been made in May 1961. On the other hand, it is crystal clear from the evidences of Ramji Lal PW 1 and Daulat Ram DW 1 that the disputed wall with khaprail existed there in the disputed site for a long time, that is 28 years before and the wall and the khaprail have been affected by salt as deposed to by these two witnesses. Moreover the court Amin's report 57-C also shows the said walls and khaprail to be 25-30 years old in its present condition. The High Court has clearly come to the finding that though the partition deed was executed by the parties yet there was no partition by meets and bounds. Moreover there is no whisper in the plaint about the partition of the property in question between the co-shares by metes and bounds nor there is any averment that the suit property fell to the share of plaintiff's vendor Ramji Lal and Ramji Lal was ever in possession of the disputed property since the date of partition till the date of sale to the plaintiff. The plaintiff has singularly failed to prove his case as pleaded in the plaint.

12. In the premises aforesaid the appeal fails and it is dismissed. There will however be no order as to costs.

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