

Surinder Kumar and another

Vs

Ishwar Dayal and another

Civil Appeal No. 3434 of 1996

(K. Ramaswamy, G. B. Pattanaik JJ)

02.02.1996

JUDGMENT

1. Leave granted.

2. We have heard the counsel on both sides. This appeal by special leave arises from the order of the Punjab & Haryana High Court made on 21-4-1994 in C. R. No. 3801/93. In a suit of perpetual injunction restraining the mother of the appellants from constructing a window in the joint wall ABFAEDC between F & G, the trial Court granted the decree on the finding that 1 1/2 ft, thick wall was a joint wall and, therefore, the appellants' mother had no right to open a window in the joint wall. The decree had become final. Subsequently, the admitted facts are that 30 area with the aforesaid zig-zag wall was sold to the respondent-decree-holders and the appellants have construed straight wall. The respondent in the cross-examination had admitted that the wall AB is 9" in width. The spot wall FG is also 9" in width. The house was constructed by Surinder Kumar in January 1991. Wall AB has also been constructed afresh. It was also admitted that the wall A to B has been constructed by Surinder Kumar in his own land. In view of these admissions, it is now clear that the wall B to A is 9" thick constructed by the appellants. The only dispute is whether the wall between G to F of is a joint wall. In view of the admission made by the respondents that the present wall F to G is also 9" thick and in view of the fact that there was a sale made of the land in the zig-zag wall between a new wall and the previous wall GFAEDC, the necessary conclusion is that the joint 1-1/4 ft. thick wall no longer exists and a new wall has been constructed.

3. The appellants having constructed a new wall admittedly from B to A with 9" width and the wall F and G also with 9" width, the necessary conclusion would be that the entire straight wall was constructed with 9" width by the appellants in their own land along with new house in which now the window is admittedly opened. It would appear that it was closed due to the contempt proceedings taken. The question is : whether the decree passed in 1965 is executable under Order 21, Rule 32, C. P. C. It says where a party against whom a decree for perpetual injunction has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree for injunction by his detention in civil prison or by the attachment of his property or by both. Though the appellant are successors in interest, due to the fact that there is an altered situation after the decree was passed and the appellants had constructed a separate wall in their own land and opened the window, the decree earlier passed became unenforceable. Therefore, the execution laid under Order 21, Rule 32, C. P. C. is unenforceable and cannot be executed.

4. The Courts below, therefore, were wrong in proceeding under Order 21, Rule 32, C. P. C. to execute decree which did not exist. It is contended by the respondents that in the sale deed executed

by the appellant, they have mentioned the wall to be the joint wall. In view of the admission made by the respondents in the evidence, though the recitals may be there, the parties appear to have agreed for the altered situation and in view of the altered situation when previous joint wall is admittedly of 1 1/2' width and the new wall with only 9" width, the appellants have reduced the width of their wall and opened the window in their, own and for enjoyment of easement of necessity of air. Accordingly, we hold that the executing Court and the High Court were clearly in error in directing execution of the old decree which no longer existed and the closure of the window.

5. The appeal is accordingly allowed. No costs. Appeal allowed.