

(2011) 08 SHI CK 0198

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No's. 222 and 598 of 2001

Gian Singh

APPELLANT

Vs

State of H.P. and Another
 State of H.P. and Another
Vs Gian Singh

RESPONDENT

Date of Decision : 05-08-2011

Acts Referred:

Citation : (2011) 08 SHI CK 0198

Hon'ble Judges : V.K. Ahuja, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

V.K. Ahuja, J.—This judgment shall dispose of an appeal filed by the Appellant against the judgment and decree of the Court of Learned District Judge, Shimla, dated 12.1.2001, vide which he had partly allowed the appeal filed by the Respondents against the judgment and decree of the Court of Learned Sub Judge 1st Class, Theog, dated 25.9.1997, vide which the suit for mandatory injunction was decreed in favour of the Appellant for the recovery of Rs. 1,03,740/- alongwith interest. By his impugned judgment and decree dated 12.1.2001, the Learned Appellate Court had allowed the relief of Rs. 36,600/- only in favour of the Appellant and as against the Respondents, against what was allowed by the Learned trial Court. This judgment shall also dispose of an appeal filed by the Respondents against the judgment and decree of the Court of Learned District Judge.

2. Briefly stated, the facts of the case are that the Appellant hereinafter also referred to as the Plaintiff filed a suit for mandatory injunction and for recovery of Rs. 79,800/- as damages as against the Respondents hereinafter also referred to as the Defendants. It was alleged by the Plaintiff that he is owner of two water flour mills installed in one building (gharat) situated on land measuring one biswa bearing Khasra No. 13 in Chak Mohari. The gharat used to be run by water of Matiana-Mahori Khad. A mallawan was erected on Matiana-Mahori Khad and

the water was taken through a pucca channel from the Mallawan upto the gharats and then the water was taken to each water flour mill separately through wooden/deodar Nallas and thus both the water flour mills used to run simultaneously throughout the year. The Plaintiff was having good return from the gharat. In the end of 1986, the Defendants started construction of Matiana-Mahori road, which passes above the gharat, water Kuhal and Mallawan of the Plaintiff. At the time of construction of Matiana-Mahori road, big boulders and debris were thrown below the road as a result of which the gharat, its two Nallas, water Kuhal and Mallawan were damaged and the water Kuhal was buried under the debris. Thus the gharat stopped working since the month of January, 1987.

3. It was further alleged by the Plaintiff that he objected in this regard, but the officials of the Respondents assured the Plaintiff that after the completion of the work of the road cutting above the gharat and water Kuhal, the PWD Department would clear the debris, erect Mallawan, reconstruct pucca water Kuhal and would repair the building of the gharat and would restore the gharat to its original position as it existed prior to 1987. After the end of January, 1987, the Plaintiff again requested the said officials to restore the functioning of the gharat, but they put off the matter on one pretext or the other. It was alleged that the Plaintiff suffered loss and damages to the extent of Rs. 21,600/- per annum, due to loss of the income of the gharat and thus, the Plaintiff claimed a sum of Rs. 64,800/- as net loss of income for three years immediately preceding filing of the suit. He also claimed the relief of mandatory injunction that the Defendants be directed to remove the debris and to reconstruct the Mallawan and pucca Kuhal and also repair the building of the gharat and in the alternative, he also claimed Rs. 15,000/- for repair of these things of gharat etc. The Plaintiff also claimed pending and future damages at the rate of Rs. 21,600/- per year.

4. The Defendants took up various preliminary objections with regard to estoppel, cause of action and non-issuance of legal notice etc. On merits, the Defendants pleaded that the gharat was old and damaged and abandoned. It was not in working condition at the time of construction of the road. There was No. sign of pucca channel in the shape of Kuhal. However, the officials gave assurance to the Plaintiff that in case Katcha dry channel is damaged by the widening work of the road, the debris would be cleared by the department by deploying labourers. All due precautions were taken by the Defendants and some debris had already been removed from the gharat. It was denied that any damage was caused to the Mallawan, water Kuhal, deodar Nallas etc.

5. On the pleadings of the parties, as many as eight issues were framed and Issues No. 1 to 4 are relevant, which are reproduced below:

1. Whether the Plaintiff is entitled to the decree of Rs. 79800/- ? ... OPP
2. Whether the Plaintiff is entitled to the relief of mandatory injunction? ... OPP
3. Whether the Plaintiff is estopped by his act and conduct? ... OPD

4. Whether water mill was not in running condition, if so its effect? ... OPD

6. The parties led their evidence and the Learned trial Court vide impugned judgment, decreed the suit of the Plaintiff for Rs. 79,800/- and for recovery of Rs. 1,03,740/- as damages alongwith future interest.

7. On appeal, the judgment was modified by the Learned Appellate Court as referred to above.

8. The Plaintiff preferred the present appeal against the reduction of the amount of damages, while the Defendants preferred an appeal against the order of the Court allowing the case of the Plaintiff for damages partly.

9. I have heard the Learned Counsel for the parties and have gone through the record of the case.

10. The appeal filed by the Plaintiff was admitted on substantial question of law No. 1, which is being reproduced below:

Whether, the Learned appellate court was justified in applying the principle of mitigation of damages by the claimant under law of torts, especially when the facts of the did not attract the application of said principle and the fact that there was No. such defence in the written statement and in the ground of appeal?

11. On the other hand, the appeal filed by the State of H.P. was admitted on the following substantial questions of law:

1. Whether the courts below have erred in wrongly appreciating the evidence on record resulting into serious miscarriage of justice?

2. Whether the courts below have fallen into serious error in awarding damages for loss of income without completely considering the issue of mitigation of damages by the Plaintiff?

12. During the course of arguments, the Learned Counsel for the Appellant had submitted that the Learned Appellate Court had erred in applying the principle of mitigation of damages, which plea was never taken by the Defendants in their written statement and as such, it was submitted that the judgment of the Learned trial Court is liable to be affirmed as against the judgment passed by the Learned Appellate Court.

13. On the other hand, Learned Assistant Advocate General for the Respondents had submitted that the judgment passed by both the Courts below is completely illegal, wrong, unjust and arbitrary to the facts of the case and as such, since the Plaintiff had failed to prove his case, his suit was liable to be dismissed accordingly.

14. On appraisal of the judgment passed by the Learned trial Court, it is clear that the Plaintiff had claimed that he had claimed a decree for mandatory injunction as well as for a sum of Rs. 64,800/- for loss of income suffered by the Plaintiff for three years. He also claimed that in case relief of injunction is not

granted in his favour, he be awarded a sum of Rs. 15,000/- for restoring status quo as it existed prior to the filing of the suit. Thus, in all the Plaintiff had claimed a sum of Rs. 79,800/- as damages. The Plaintiff had also claimed pending and future damages at the rate of Rs. 21,600/- per year. The Plaintiff had proved this fact that he was owner of the land comprised in Khasra No. 13. The Plaintiff had appeared in the witness box as PW-1 and testified that his gharat consisting of two water flour mills, was situated below the road and the gharat was in working condition prior to the construction of the said road. He also stated that debris fell on the gharat etc., which were damaged. PW-2 Chanchiya, PW-3 Smt. Devkoo and PW-4 Bharat Singh also supported the statement of the Plaintiff that the gharat was in a working condition prior to the construction of the road. PW-5 Kesru Ram, who was working as Mate in PWD department has also supported the statement of the Plaintiff that the gharat was in a working condition and Kuhal was damaged due to the debris, which fell on it at the time of construction of the road. All these statements were further corroborated by PW-6, Junior Engineer of the Respondent department, who also supported the statement. He also stated that he had given in writing Ext. PW6/A to the Plaintiff about the damage caused to the gharat of the Plaintiff and he stated that he cannot say if the gharat was repaired after 1987, though he firstly stated that it was repaired by the authorities. He changed his stand in the cross-examination that the gharat was not in working condition prior to the construction of the road. Ext. PW6/A is a writing given by the Junior Engineer that the flour mill has been damaged and is not in a working condition due to the debris. The Local Commissioner had also been appointed, who gave his report that the water mills were not in working condition and the roof of the water flour mills has been broken. All the evidence was also relied upon by the Learned District Judge in coming to the conclusion that the gharat in question had been damaged by the act of the Defendants.

15. To rebut this, the Defendants only examined DW-1 Mohan Lal Raina, J.E., who admitted that a sum of Rs. 15,000-20,000/- is required for repair of the gharat and water Kuhal of the Plaintiff. The Learned trial Court had come to the conclusion that the Plaintiff was entitled to recover damages to the tune of Rs. 21,600/- for a period of three years prior to the filing of the suit. He was also held entitled to recovery of Rs. 15,000/-, which the Defendants in its evidence had admitted that it will be required for repair of the gharat. In regard to the claim for damages at the rate of Rs. 21,600/- per year for the period during the pendency of the suit, it was held by the Court that the Plaintiff will affix the required court fee on such adjudged amount, but those finding cannot be said to be correct, since the Plaintiff had No. cause of action to claim the future damages also. A perusal of the judgment of the Learned District Judge shows that it had come to the conclusion that the award of Rs. 15,000/- as compensation for the repair of the gharat and removal of the debris can be said to have been correctly awarded by the Learned trial Court. It was answered under Point No. 3 that the gharat was damaged in the year 1987 and the Plaintiff took No. steps to repair

the gharat and as such, there would not have been future loss of income from the gharat. The principle of law of torts was applied that it was the Plaintiff to mitigate his loss and determining this principle, it was not necessary for the Defendants to have taken a specific plea, which was legal and could have been considered by the Court, which was rightly considered by the Learned District Judge. However, the loss of income was assessed for a period of one year only and the decree was modified.

16. During the course of arguments, No. infirmity could be pointed out by the Learned Counsel for the Appellant, so as to hold that the principle of torts was wrongly applied or that the appeal filed by the Appellant deserves to be allowed. Similarly, the Learned Assistant Advocate General for the State had also not been able to show any infirmity in the findings so recorded by the Learned Appellate Court, which are based upon facts and sound reasoning has been given. There is No. merit in the appeals filed by the Plaintiff or by the Respondents. Both the appeals filed by the Appellants are dismissed and the findings of Learned District Judge are affirmed accordingly. The Plaintiff shall be entitled to the amount as assessed by the Learned District Judge, which as informed, is lying in deposit in the Court and shall be released as per the findings recorded by the Learned First Appellate Court. Both the appeals stand dismissed. However, the parties are left to bear their own costs.