
(1960) 12 MP CK 0047
In the Madhya Pradesh High Court
Case No : S.A. No. 11 of 1959

Malojirao Shitole

APPELLANT

Vs

Kanhaiyalal Hazarelal

RESPONDENT

Date of Decision : 05-12-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Gwalior Civil Procedure Code — Section 525

Citation : (1961) JLJ 491

Hon'ble Judges : Shivdayal, J

Bench : Single Bench

Advocate : Vishvarup, for the Appellant; Patankar, for the Respondent

Final Decision : Allowed

Judgement

Shivdayal, J.—In this second appeal the dispute is about a wall between the houses of the plaintiff and the defendant firm. The disputed wall "measuring 370ft-6 inches in length," is denoted by the letters K. Kha in the paint sketch. To the east of this wall is the house of the defendant firm which was sold to it by the plaintiff on June 28, 1920. To the west of the disputed wall is the plaintiff's house.

2. The plaintiff claimed the disputed wall as his property. His grievance in the plaint was that the defendant made certain encroachments on it. He prayed for a declaration of title to and possession of the wall as also for the removal of all encroachments made by the defendant and for an injunction to restrain it from making any further encroachment. In the alternative he claimed a declaration that the wall was a party-wall and that the defendant had no right to encroach upon it while the plaintiff had a right to use it to the extent of half the width.

3. The trial Court dismissed the suit holding that the plaintiff failed to prove his title. His first appeal was also dismissed. Since the suit was instituted on February 2, 1944 when the Gwalior State CPC (Zebta Diwani) was in force, this appeal has

to be decided u/s 525 of that Code, although in the memorandum of appeal the plaintiff has mentioned Section 100 of the CPC as applicable to it u/s 525 the appellant is entitled to be heard on questions of fact as well.

4. The plaintiff examined several witnesses, namely Ram Prasad, Hoharilal, Gopa, Jiya Narain, Ram Karan and Saligram, who stated that in their opinion the disputed wall belonged to the plaintiff because they had been seeing the wall for a number of years and the defendant had made new constructions when it encroached upon it. Having gone through their statements I find that no useful assistance can be had from their evidence. Their testimony is vague and indefinite, they have no solid basis of their opinion as regards the ownership of the wall. Anant Abhyankar was produced by the plaintiff to say that the defendant made certain constructions after obtaining permission from the Municipality, His evidence too is of no value on the question of ownership of the disputed wall. Plaintiff examined himself and stated that the wall belonged to him and whenever he got information that the defendant was encroaching upon it he objected. From his statement also it cannot be ascertained when this wall was constructed and by whom.

5. The defendant examined Bishannath, Harish Chandra, Bati and Raghubar Dayal. Their evidence is no better. They too did not disclose any reliable basis for their information. Raghubardayal is the son of Radha Kishan, who was alleged in paragraph 2 of the plaint to be the karta of the defendant firm and this fact was admitted in the written statement. Radha Kishan did not examine himself. Raghubar Dayal's explanation was that Radha Kishan was in a weak state of health and was also short-sighted Raghubar Dayal's age at the time of his deposition (on 10-1-51) was 42 years which means that he was of 11 years in 1920 but Radha Kishan must have been fairly grown up when the property was sold to the defendant firm in 1920. At any rate, Raghubar Dayal did not state in clear terms that the disputed wall was specifically sold by the plaintiff to the defendant firm. Like the plaintiff, he stated that the wall belonged to the defendant firm,

6. From the above resume it is apparent that both the sides could not state with any amount of definiteness by whom the wall was constructed and when. It appears from the evidence of Ahsanullah Khan, whose evidence I shall have the occasion to discuss later, that the wall was quite an old one. It is a single wall between the two houses of the parties. To resolve the dispute of this nature oral evidence is really of little worth. Documentary evidence and constructional situation go a long way to determine whether such a common wall belongs to one of the parties or to both.

7. It is on record that the house which now belongs to the defendant was sold by one Laxmi Narain to one Biharilal on October 31, 1919. Biharilal sold it to the plaintiff on January 18, 1920 and the plaintiff, in his turn sold it to the defendant firm on June 28, 1920. It is also on record that the plaintiff sold to the defendant precisely the same property which he purchased from Biharilal. There is a site-

plan (Ex. D. 14) on record. The learned trial Judge thought that the line drawn in the west extreme of the premises sold to the defendant represented the disputed wall. In my opinion this assumption was erroneous. In a site-plan of this nature where lines are drawn to demarcate the property sold, such lines of delimitation do not necessarily represent walls unless it is so specified. I have perused all the three sale-deeds, there is no mention of the disputed wall. The above site plan also does not show that the particular line denoted a wall, I am clearly of the opinion that that line is a line of demarcation rather than one representing a wall. These documents are, therefore, ambiguous. It cannot be made out from them that the disputed wall was really sold to the defendant, nor can it be held conversely. Having regard to the situation of the wall and its nature, it was for the defendant to prove that it was his exclusive property.

8. Raghubardayal did not even state that there were any negotiations or any specific agreement between the parties about this wall, at the time of the sale of the house. He, however, supported his claim by the fact that the property sold to the defendant firm included a pator slabs of which rested on the disputed wall.

9. In the case of such an old wall as existed even prior to the year 1919, it is too much to expect positive evidence of those who built it or who saw it built. Any endeavour to lead evidence about it was mere padding. The sale deeds being silent about the ownership of the wall, one cannot jump to the conclusion that it must have been sold to the respective vendees as their exclusive property.

10. In a case of this nature evidence of technical experts is undoubtedly of great value. The plaintiff produced Ahsanullah Khan and Vindeshwari Prasad, two retired engineers. They submitted their reports and were examined as witnesses. In their opinion the wall upto the well was a party-wall. common to both the houses, but beyond that point it exclusively belonged to the plaintiff. Admittedly there are inches on the plaintiffs side. Both the experts stated that there were double storeyed stair cases fixed in the disputed wall. That was not contraverted. Ahsanullah Khan got even the foundation dug up and discovered that the wall was a very old one. It is remarkable that the stair cases were built of the same material as the disputed wall. Although I do not agree with the experts that merely because from the well onwards there are no constructions on the side of the defendant, the wall must be held to be exclusively of the plaintiff, yet on a perusal of their evidence, I see strong reasons to hold that this is a party-wall belonging to both the houses. Undoubtedly, the defendant has been making constructions, and using this wall for a number of years, and, on the other hand, this wall has been in the plaintiff's use also for still a longer period. It is one and a half feet wide.

11. A party-wall which stands between two houses must generally be presumed to be the common property of the owners of both the houses as tenants-in-common. It is only where a wall stands partly on one man's land and partly on the other's and the precise extent of land which originally belonged to each party can be ascertained, the presumption in favour of tenancy-in-common gives

way to the inference that each owns that portion of the wall which stands upon his own land. In this case, as discussed above, there is no evincive proof to displace the presumption, on the other land, the structural considerations lend support to the presumption. The defendant utterly failed to rebut the presumption or to prove that the wall was specifically sold by the plaintiff. Section 8 of the Transfer of Property Act, relied on by the lower appellate Court, does not help the defendant.

12. For these reasons it must be held that both the parties failed to prove exclusive ownership of the disputed wall and it must be held to be a party-wall belonging to both the parties as tenants-in-common.

13. I have considered the rights of the owners of a party-wall in *Gulabchand vs. Manikchand* (1960 J.L.J. 419). The wall is to be utilised for the common benefit and convenience of the owners of both the tenements which it separates. Each party must use the wall reasonably, so that its enjoyment by the other is not interfered with. Neither of them should do anything which has the effect of excluding the other party or of damaging the wall. If one party excludes the other from its use by placing an obstruction, the remedy of the excluded tenant is to remove the obstruction. If one party, in the construction of his house inserts beams or pillars into the wall on his side, the other owner has no cause for complaint unless the acts alleged amount to his ouster or damage the wall. If one party raises the height of the wall with the object of building a super-structure on his own tenement, the other who has not given his consent either expressly or by implication is entitled to a decree for reducing the height to its previous level. Where the consent of the other is found, the raised portion of the wall is not the exclusive property of the owner building it, but partakes the same character as the original wall. If there is a partition, each of them may become the owners of the longitudinal moiety abutting on his own premises and each may have the right of easement of support from the other.

14. In this case it is proved that the defendant made the constructions more than twenty years before the suit. The plaintiff's inaction constituted his acquiescence. By this conduct he is estopped from claiming a demolition of these structures.

15. It is a well established rule of law that if a party has an interest to prevent and-act being done and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of another is altered by giving credit to his sincerity, he has no more right to challenge the act to the other's prejudice than he would have had if it had been done by his previous licence. A man may by acquiescence not only preclude himself from being able to derogate from a state of things which has been brought by his own conduct, but may even give the adverse party a right to the interference of the Court in the event of his complaining at law.

16. In the case in hand, the defendant could reasonably believe that the disputed

wall was sold to it. In fact evidence was led to show that the plaintiff never objected when the suit wall was involved in the new constructions made by the defendant after it purchased the property from him in 1920. Long abstention from the assertion of his right, coupled with an alteration of the position of the other party renders it unconscientious on the part of the plaintiff to enforce it. It is stated in 21 Halsbury Hailsham 364:-

"A mandatory injunction will not be granted where the plaintiff is guilty of unreasonable delay in applying for it and the getting of it would cause the defendant serious damage."

17. If a co-owner of a party-wall stands by and suffers the building to proceed to a considerable extent, his acquiescence in the erection will be implied therefrom (See *Basanta Singh vs. Shiva Mal* 107 IC. 481). In AIR 1925 642 (Lahore) , the plaintiff was denied the relief of demolition of structure over a party-wall which was claimed after eight years, a decree for mere declaration was passed. Following those principles the plaintiff's claims for possession and for removal of construction must be thrown out. It must also be remembered that initially the plaintiff brought this suit to claim an exclusive proprietorship of the disputed wall but subsequently he amended the plaint and came forward with an alternative case that it was the property of the owners of the adjoining houses.

No restrictive injunction is necessary either. In future the parties shall be entitled to exercise and enforce their respective rights.

In order to get a declaration that the disputed wall is a party wall, there can be no doubt that a cause of action arose to the plaintiff in the year 1939 when new cloud was cast on his rights. The suit is, therefore, within time under Article 120 of the Limitation Act, so far as that declaration is concerned.

18. In the result, this appeal is partly allowed. The judgment and decrees of both the Courts below are modified. A decree for declaration shall be passed that the disputed wall is a party-wall belonging to both the parties. The rest of the plaintiff's suit shall stand dismissed, as he is not entitled to any other relief. Parties shall bear their own costs throughout.