
(2013) 08 RAJ CK 0092
In the Rajasthan High Court
Case No : Civil Second Appeal No. 139 of 1983

Shanti Lal

APPELLANT

Vs

Gaindi Lal (deceased) through Harish Chandra, Girraj and
Others

RESPONDENT

Date of Decision : 02-08-2013

Acts Referred:

Citation : (2014) 1 WLN 116

Hon'ble Judges : Mohammad Rafiq, J

Bench : Single Bench

Advocate : D.D. Patodia, Mr. R.K. Agrawal and Ms. Sunita Pareek, for the Appellant; D.D. Patodia, Counsel, Shri R.K. Agrawal and Ms. Sunita Pareek, for the Respondent

Final Decision : Allowed

Judgement

Mohammad Rafiq, J.—This is defendant's second appeal filed against judgment and decree dated 06.12.1982 passed by learned Additional District Judge No. 5, Jaipur City, Jaipur, whereby judgment and decree dated 28.06.1976 passed by learned Additional Munsiff No. 2, Jaipur City, Jaipur, partly decreeing the plaintiff's suit for permanent injunction, has been set-aside and the suit of the plaintiff has been decreed in toto. Plaintiff-respondent filed a suit for permanent injunction against Smt. Chhuttan Bai, predecessor-in-title of defendant-appellant and other five defendants, who are respondents no. 2 to 6 herein, on 28.10.1972. It was pleaded in the plaint that plaintiff and defendants no. 1 to 4 are co-sharers in house No. 512 ("haveli") situated in Rasta Hanumanji Gali Chobiyan choukdi, Bisheshwarji, Jaipur. Defendant no. 5 is tenant of defendant no. 4 in a room on third floor towards northern side of "haveli". Defendant no. 6 is also tenant of defendant no. 4. He has taken room on rent on fourth floor towards southern side. Defendants no. 5 and 6 have no right of way through "ravish" (balcony in the chowk facing rooms of the upper stories) towards the plaintiff's house. Defendant no. 1 Chhuttan Bai has her share on second floor

towards western side of the "haveli", in which there is an old "parnala" (spout). Some time back, chhuttan Bai also got a new "parnala" constructed, breaking the wall, which has opening into the "ravish", owing to which dirty water collects on the "ravish" and causes filth there. It causes obstacles for the plaintiff to use his house towards northern side on the second floor and it also adversely affect the health of the family. Dirty water of the house of defendants is collected in a "pavandi" (pit) in the chowk through the "parnala". There is no permanent arrangement for exit of the water. Sometimes water in "pavandi" (pit) overflows and spreads in the chowk, thus causing nuisance. The "pol" (room like entrance of the house) of the "haveli" requires immediate repair. The present doors of the "pol" also require repair and even if the same are repaired, they would not survive long and therefore, new doors are required to be built. Prayer was therefore made that defendants be restrained from throwing garbage (filth) and dirty objects; they may be directed to make necessary arrangement for exit of dirty water from the chowk. It was also prayed that the defendants may be directed to get the "pol" repaired; to get the preset doors of the "pol" repaired immediately and thereafter to get new doors built. The defendant no. 1 be required to close the spout, and further restrained from using "ravish" in front of the rooms of the plaintiff in the "haveli" and be further required to keep the doors of the "pol" closed during night.

2. Defendants no. 1 Chhuttan Bai and defendants no. 4, 5 and 6 separately filed written statement denying the allegations in the plaint. Defendant no. 1 Chhuttan Bai, in her written statement, disputed correctness of the site plan produced by the plaintiff and asserted that all the rooms shown in yellow colour did not belong to the plaintiff. It was pleaded that there are two staircases in the "haveli". The "ravish" on all the floors is joint property of all co-sharers and therefore their tenants have also right to use both the staircases and the "ravish". There was only one old "parnala" (spout) on the rooms of the first floor and allegation that new "parnala" has been got constructed, was denied.

3. Plaintiff examined himself as PW-1, Kaluram as PW-2, Ram Kumar as PW-3 and Radha Mohan as PW-4. Plaintiff produced Photo copy of the judgment as Exhibit-1. The defendants examined Shanti Lal as DW-1, Mahavir Prasad as DW-2, Mahavir Singh as DW-3 and Roop Narain as DW-4. They also produced gift-deed in evidence, which is as Exhibit A/1.

4. Following issues were framed on the basis of the pleadings of the parties:-

1. whether the "ravish" towards the portion of plaintiff, exclusively belongs to the plaintiff, and the defendants do not have any right to use it as a way?
2. whether defendant no. 1 has constructed a new "parnala" at the place "z" shown in the map and the plaintiff is entitled to get it closed?
3. whether the "pavandi" constructed in the chowk causes dirt and the plaintiff is entitled for a direction to the defendants to make arrangements for uninterrupted flow of dirty water?

4. whether the "pol" requires immediate repair and the defendants are duty bound to get it repaired?
5. whether defendants keep the doors of the "pol" open during the whole night and they restrain the plaintiff to close it?
6. whether the doors of the "pol" are not repairable and requires replacement by new one and the plaintiff is entitled to get the expenses to be incurred on it from the defendants?
7. whether the defendants cause nuisance by spreading garbage in the chowk and the plaintiff is entitled to get them restrained by way of permanent injunction?

5. The trial court partly decreed the suit vide judgment and decree dated 28.06.1976 holding that "ravish" of "haveli" in dispute was common and therefore could be used according to the necessity by any of the co-sharers without causing any disturbance to others and that the defendant no. 1 will not cause any filth on the "ravish" and would close the "parnala", if it has already been opened. Learned trial court directed for repair of the "pol" and its doors and also for closure of the doors during night. Dissatisfied with aforesaid judgment and decree passed by the trial court, both, the plaintiffs as well as defendant Chhuttan Bai, filed appeals before the first appellate court.

6. The first appellate court by judgment dated 06.12.1982 accepted the appeal filed by the plaintiff and dismissed the appeal filed by defendant no. 1 Chhuttan Bai. During pendency of first appeal, defendant Chhuttan Bai died, therefore, appellant Shantilal substituted Smt. Chhuttan Bai as her legal representative.

7. Shri D.D. Patodia, learned counsel appearing for defendant-appellant, argued that except two tenants (defendants no. 5 and 6), all other parties are co-sharers in the disputed "haveli". Nanagram had four sons, namely, Surajmal, Mithhalal, Anandilal and Dhannalal. Though, Anandilal and Dhannalal were dead and Gulab Bai and Mohani Bai, respectively, were their widows. Mithhalal had one son Fatehlal. Fatehlal is father of defendant-appellant and Chhuttan Bai happens to be mother of defendant-appellant (wife of Fatehlal). Surajmal had two sons, namely, Gaindilal and Gyarsilal. According to the appellant, Gulab Bai w/o Gaindilal executed a will in his favour. Gyarsilal had one son, by name Harish. His wife Renu Jain was surviving.

8. Shri D.D. Patodia, learned counsel, at the outset submitted that in so far as the issue regarding spout is concerned, the same has already been decided by this court, although in a different appeal at the instance of the appellant, being S.B. Civil second Appeal No. 180/1993-Shantilal vs. Gyarsilal and Others, vide judgment dated 19.02.1997, wherein appellant Shantilal had given an undertaking to get a pipe fitted on the spout and take water through pipe and discharge the same in accordance with the undertaking so that it may not spread in the "ravish". For doing so, he punctured the "ravish" and let the pipe go

through it. It was argued that no cause of action accrued against the defendant-appellant. The lower appellate court therefore erred in law in passing the decree against Chhuttan Bai. The relief claimed by the plaintiff in the plaint was not in consonance with the allegations in the plaint. Thrust of the pleadings in the plaint was against the defendants no. 5 and 6, who are tenants of defendant no. 4, to restrain them from using the way through "ravish" leading to the house of the plaintiff in the "haveli". The first appellate court acted illegally in holding that the "ravish" towards the house of the plaintiff belongs to him and the defendants have no right to use the "ravish". The plaintiff produced title-deed to prove his ownership as regards the property shown in yellow colour in the plaint. He, however, did not produce any document to show that the "ravish" in front of the property shown in yellow colour and the site plan, exclusively belongs to him and other co-sharers have no right of way through the "ravish". The burden of proof of issue no. 1 was on the plaintiff. He failed to prove the ownership of "ravish". Evidence produced by him was not at all sufficient to prove the ownership of "ravish". The first appellate court has based its findings entirely on surmises and conjectures.

9. Shri D.D. Patodia, learned counsel, further argued that the first appellate court relied on the impression gathered from the inspection of the site. It had no basis to hold that the "ravish" in front of the rooms of the plaintiff, was owned by him and other co-sharers have no right of way through the same. The plaintiff has given contradictory statement before the court, while at one place, he relied on the partition-deed for ownership of the "ravish" and, at another place, he relied on the judgment dated 14.07.1970 (Exhibit-1). Partition-deed has not been produced by him. The judgment dated 14.07.1970(Exhibit-1) nowhere observes that the whole "ravish" belongs to the plaintiff. The lower appellate court illegally held that in order to reach his house on the first floor, the plaintiff can pass through the "ravish" in front of the house of defendant Chhuttan Bai, while not granting correspondence right to the defendants. The plaintiff, in his statement, has stated that he has right of way through "ravish" in front of the room of Chhuttan Bai and this right has been mentioned in that document. No such document, however, has been produced by the plaintiff. If the plaintiff-respondent had right of way through "ravish" in front of the house of co-sharers, the other co-sharers of the property should also have similar right, whereas the learned first appellate court has held that defendant-appellants would have no right of way through "ravish" in front of plaintiff's rooms/house. Hence, it is prayed that the appeal may be allowed and the judgment and decree of the first appellate court may be set aside.

10. Shri D.D. Patodia, learned counsel, further argued that decree passed by the trial court against defendants no. 2 and 3, was ex-parte. Defendants no. 5 and 6 were tenants of defendant no. 4. They maintained that the "ravish" of the "haveli" belongs to everyone as it was a joint property. The plaintiff has taken different stands at different stages depending on what suited him in a given situation. The plaintiff, at one place, he relies on the partition-deed for ownership

of "ravish" and, at another place, relies on the judgment (Exhibit-1), which nowhere says that "ravish" belongs to the plaintiff. Chhuttan Bai was widow of Fatehlal and appellant Shanti Lal is son of Fatehlal. The plaintiff sold two rooms on the first floor, which were said to have been purchased by him from Fatehlal, but no such sale-deed was executed by the plaintiff. The findings recorded by the first appellate court are perverse and that no reasonable man would come to such conclusion on the basis of material available on record.

11. Shri D.D. Patodia, learned counsel for the defendant-appellant, has taken the court through the judgments of the trial court as also the first appellate court. He argued that the first appellate court in a most cursory and lackadaisical manner decreed the suit without recording any adequate reasons.

12. It was argued that defendant Chhuttan Bai filed an application before the first appellate court under Order 41 Rule 27 of the CPC on 18.08.1979 for taking on record certified copy of the statement of plaintiff Gairdilal recorded on 16.07.1979 in another suit. Learned counsel argued that the dispute with regard to "parnala" has been finally decided by this court vide its order dated 19.02.1997 in S.B. civil second Appeal No. 180/1993-Shantilal vs. Gyarsilal and Others. Therefore, that issue is not open to be examined in the present appeal. Only question that requires consideration of this court is whether the finding given by learned first appellate court that all the co-sharers do not have right to use the "ravish", as the same is not a joint property and that only the plaintiff can make use of the "ravish" or they can use the "ravish" only in front of their rooms. Thereto also, learned first appellate court has made exception that the defendant-appellant cannot use the "ravish" falling in front of the rooms of the plaintiff but the plaintiff would have right to use the "ravish" in front of defendants' rooms to reach the staircase on their side, whereas there are two staircase on both the sides of the "haveli".

13. Learned counsel argued that plaintiff Gairdilal (PW-1), in his statement, relied on sale-deed by Fatehlal with respect to part of the share in the disputed "haveli", the partition deed, in which "ravish" in front of his room is said to have been described as his personal and alleged will by Gulab Bai, wherein also "ravish" in front of the rooms bequeathed by her to the plaintiff, is shown as his personal. But none of these three documents have been produced. All that was stated was that latter of these two documents, were in possession of the defendant Shantilal, which is not at all acceptable because there could be no reason for these documents with shantilal. His failure to prove in all these documents should be reason enough to reject his contention that the "ravish" was his individual property and was not a joint one. In so far as the pleadings are concerned, the plaintiff in para nos. 2 and 3 of the plaint, pleaded only in respect of defendants no. 5 and 6 that they do not have any right to use the "ravish" in front of the plaintiff's room but there is no such pleading as against defendant no. 1 Chhuttan Bai, the predecessor-in-title of the appellant, herein, or any other defendant. The learned first appellate court has therefore erred in

law in granting the relief beyond the pleadings. Learned counsel has, in support of his arguments, relied on the judgment of the Supreme Court in Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, wherein it was held that if a party is in possession of best evidence, which would throw light on the issue in controversy and withholds it, the court ought to draw an adverse inference against him notwithstanding that onus of proof does not lie on him. A party cannot rely on abstract doctrine of onus of proof or on the fact that he was not called upon to produce it. Since there was no pleading against the appellant or his predecessor-in-title, no relief could be asked for by the plaintiff against him and granted by the learned first appellate court. It is argued that while the learned trial court decided the suit on the basis of evidence of the parties, the learned first appellate court has devised an unusual way of deciding it on the basis of inspection carried out by the Presiding Officer completely ignoring the evidence. The judgment has been passed entirely on imagination, surmises and conjectures, rather than on ground realities. The inspection carried out by the Presiding officer has thus worked to the disadvantage of the plaintiff. The judgment in appeal is therefore liable to be set aside and that of the trial court is liable to be restored.

14. Per contra, Shri R.K. Agarwal, learned senior Advocate appearing on behalf of plaintiff-respondents opposed the appeal and argued that the defendant-appellant Shanti Lal claims to have become owner of the part of the disputed "haveli" on the first floor and ground floor, on the basis of gift made in favour of his mother by one Hari Kishan, who is stranger and is not a member of same family. He does not fall in the family tree, therefore is not a co-sharer. Part of the premises on the first floor is also claimed to have been purchased by his mother from defendant no. 4 Mohan. It cannot therefore be said that defendant-appellant would acquire right by reason of his being a co-sharer in the disputed "haveli". As regards the alleged lack of pleading on the question of "ravish" being a joint property, learned senior Advocate submitted that this was so pleaded, though in the context of tenants defendants no. 5 and 6, who are tenants of defendant no. 4 in para 2 and 3 of the plaint. But the defendant-appellant in para 2 of the written statement, has set up a categorical plea that the "ravish" is joint property of all the co-sharers and that "ravish" has to be used to use two common staircases, which go even upto fourth story on both the sides of the "haveli", therefore it has to be treated joint property. The trial court, on the basis of such pleadings of the parties, framed the issues, which also included the issue no. 1, whether the plaintiff was exclusive owner of the "ravish" in front of his house and the defendants do not have any right to come through the same "ravish"? it was argued that once the issue was framed, the question of lack of pleadings became immaterial. When both the parties have joined the issue, question of burden of proof also falls into insignificance. The matter will have to be decided on the basis of evidence and not on the ground of absence of pleading. Absence of pleadings in the plaint has not occasioned prejudice to any of the parties because the parties fully understood the case and

lead evidence thereabout and also cross-examined witnesses of each other. Learned Senior Advocate referred to the judgment of the first appellate court and argued that learned presiding officer while inspecting the disputed premises visually examined what he has mentioned in the judgment. It cannot be therefore said that there was absence of evidence in support of his findings.

15. Learned senior Advocate for plaintiff-respondents also referred to the map enclosed with the plaint and argued that the defendant-appellant has got his two rooms on the ground floor and two rooms on the first floor. He has entry to his house through "pol" which lead to common chowk. The joint staircase opens in the chowk, therefore, he can straight go to the first floor. The learned trial court has rightly held that the defendant can use the common toilet situated just behind the temple of Shri Sitaram Ji, which is at the middle level of the first and second floor, and can be reached by covering half the steps. The defendant-appellant need not pass through the "ravish" in front of the rooms of the appellant on the first floor to reach to that common toilet. He can go to the same through the staircase opening in the chowk. Learned first appellate court also referred to the gift-deed (Exhibit A-1) written by Hari Kishan in favour of Chhuttan Bai, the predecessor-in-title of the defendant, and argued that the said gift-deed does not prove that the "ravish" in front of the room of the "haveli" belonged to all co-sharers. Learned Senior Advocate argued that as per order 18 Rule 18 of the CPC the learned first appellate court was within its jurisdiction in going to the site of the disputed property for the purpose of inspection, and the memorandum of fact observed at such inspection carried out by the Presiding Officer shall form part of the record. Even the gift-deed (Exhibit A-1), produced by the defendant, does not prove that "ravish" was common/joint of all the co-sharers. As regards the document Exhibit A-1 executed by Hari Kishan in favour of Chhuttan Bai, the mother of defendant-appellant, it is argued that although Hari Kishan thereby gifted his share of the "haveli" on ground and first floors, but the gift-deed incidentally also mentions that defendant Chhuttan Bai would also be entitled to use chowk, "pol", "taharat" (toilet), staircase, "ravish" etc., which prove that the defendant-appellant got the right to use "ravish" in front of their rooms on that basis. Such mention however cannot be read to mean that defendant or his predecessor-in-title Mst. Chhuttan Bai acquired the right to use the "ravish" only by aforesaid gift deed and not otherwise. The aforesaid stipulation in the gift deed also does not conclusively prove that the "ravish" was personal to Shri Hari Kishan, who gifted the room/house to Mst. Chhuttan Bai. It is therefore prayed that this appeal be dismissed.

16. Instant appeal was admitted by this court on 11.07.1983 for hearing on the following substantial questions of law:-

1. whether the "ravish" in front of the rooms of a co-sharer ordinarily belongs to him and the other co-sharers have no right of way through the same?
2. whether the Additional District Judge acted illegally in holding the "ravish" in front of the rooms of the plaintiff is owned by him and that the other co-sharers

have no right of way through the same?

3. whether the lower courts acted illegally in deciding the right of the appellant in "ravish" in the absence of any such plea in the plaint?

17. It should be noted at the outset that the dispute with regard to new "parnala" (spout) opened by the defendants, though has been agitated before both the courts below and also before this court, but none of the three questions that were framed as substantial questions of law, at the time of admission of appeal, refer to spout. But that question having been decided between the parties by judgment dated 19.02.1997, of this court in S.B. Civil second Appeal No. 180/1993, filed by appellant Shantilal, herein, is not required to be examined.

18. Contention that there was no specific pleading in the plaint with regard to "ravish" being personal property of the plaintiff, and therefore the impugned judgment of the first appellate court be set aside, is noted to be rejected for the reasons to be stated. No doubt, such pleadings were made in the plaint in the context of use of "ravish" by defendants no. 5 and 6, who were tenants of defendant no. 4, not explicitly in regard to defendant no. 1 but nevertheless defendant no. 1 in para 2 of her written statement categorically stated that the "ravish" was joint property of all the co-sharers and that there were two staircases for going to third story and for that purpose "ravish" has to be used and this is all the more so because, these two common staircases, on both the sides of the "haveli", go even upto fourth story. In view of this conflict in the pleadings, the learned trial court framed issue no. 1. The parties fully understood their case and therefore the question of lack of specific pleadings in plaint in respect of the right of defendant no. 1 became inconsequential. Though at the same time, it may be stated that such fact was specifically pleaded in the context of another co-sharer defendant no. 4 even in the plaint. Once the issue was framed and parties fully understood their case, and led evidence which is evident from the number of witnesses produced by the plaintiff and defendant, the question of burden of proof also fell into insignificance, as rightly argued by learned Senior Advocate appearing on behalf of the plaintiff-respondent. In any case, when the parties joined the issue, it was an issue wherefor burden of proof fell on both the parties because one party claimed it to be its personal and another party was asserting it to be common of all co-sharers. Reference in this connection may be made to the judgment of the Supreme Court in Sree Swayam Prakash Ashramam and Another Vs. G. Anandavally Amma and Others, In that case too, the defendant contended that there was absence of pleadings in the plaint regarding implied easementary right in relation to pathway concerned. The trial court passed the decree on the basis of conclusion as to such implied grant. The appeal thereagainst was dismissed by the first appellate court, which was affirmed by the High court as well. Considering this aspect, the Supreme Court held that although there was no specific issue on the question of implied grant but as the parties have understood their case and for the purpose of proving and contesting implied grant, had adduced evidence, the trial court and High court

came to the conclusion that the plaintiff had acquired the right of easement in respect of pathway by way of implied grant. Absence of pleadings was held to be immaterial and argument was rejected.

19. Here in the present case, it cannot be said that there was total absence of pleadings. The issue no. 1 was specifically framed on the basis of assertions and counter assertions made by the parties in their pleadings. The plaintiff adduced his evidence and the defendant adduced his evidence and they and their witnesses fully understood the case and accordingly made statements before the court. The argument noticed above is therefore devoid of merit and it is accordingly rejected.

20. Let me begin by observing that it is a case of gross mis-appreciation of evidence by the first appellate court, which has by taking perverse and erroneous view of the matter, has reversed the judgment of the trial court. Therefore, in my considered view, interference by the High court in second appeal would be fully justified for the reasons to be stated hereinafter.

21. The core issue that needs examination is whether the first appellate court was justified in reversing the findings recorded by the trial court on the question of "ravish" as joint property. In other words, whether the first appellate court had justification to hold that "ravish" in front of the rooms of the plaintiff was personal to him and could not be used by the defendants and the "ravish" in front of the rooms of the defendant-appellant was common and could be used by the plaintiff to reach the staircase in the corner opposite the rooms of the plaintiff and adjacent to the rooms of the defendants? This court is conscious of the fact that whether or not "ravish" is common property between the parties, is a finding of fact and is normally not open to interference in the scope of second appeal. But the contention that this is a finding of fact, cannot be accepted for the simple reasons that in the first place whether or not the "ravish" is a joint property of all the co-sharers, though is a question of law, but it has to be decided on the correct appreciation of evidence. Secondly, the courts below have not concurrently held it to be so and this finding has been rendered by the learned first appellate court by reversing the finding to the contrary recorded by the trial court. And thirdly, this court can legitimately interfere even with a finding of fact, which in its opinion, is based on no evidence, which no reasonable person of ordinary prudence could on the basis of given evidence, reach. while therefore proceeding to examine the correctness of the impugned judgment passed by the first appellate court on issue no. 1, this court will confine its scrutiny within these parameters of law.

22. Since the impugned judgment is based on a finding of reversal, it would be appropriate to briefly examine what weighed with the trial court on this issue to reach to the conclusion that "ravish" was joint property of all the co-sharers. This is necessary to decide as to if interference therewith by the first appellate court was justified. The trial court noticed the statement of Gaindi Lal (PW-1), who asserted that "ravish" in front of his house was his personal and the

defendants have no right to pass through the same. Kaluram (PW-2) however pleaded ignorance as to whether "ravish" was common between the parties or not. Ramkumar (PW-3) also expressed ignorance on the question of "ravish" being common of all the co-sharers. Shanti Lal (DW-1) however, stated that "ravish" of second and third story of the "haveli" was common of all the co-sharers, who have the right to pass through the same. Mahavir Prasad (DW-2) has also similarly stated that all co-sharers used the "ravish" of "haveli" on all its floors. Mahavir Singh (DW-3) has also made similar statement. Roop Narain (DW-3) has similarly stated that "ravish" was common and joint of all the co-sharers and each one of them has been using it. The learned trial court in the light of this evidence, therefore, observed that when it is a multi storied "haveli" with a chowk in the middle of it and the rooms facing "ravish" constructed in all its four sides on all the floors including on second and third floors to facilitate access to such rooms, "ravish" cannot be held to be personal to any of the parties. The trial court therefore held that this would be joint and common "ravish" belonging to all the co-sharers, otherwise how possibly could other co-sharers have access to the respective rooms falling in their share in the "haveli"? in order to reach their rooms, it is but natural that they would have to pass through the "ravish" falling in front of the rooms of other co-sharers. If every co-sharers starts asserting that "ravish" in front of his room/house is his personal and another co-sharer cannot pass through the same, it will be impossible for other co-sharers to reach their rooms/house. The trial court also held that since there are two common staircases in the "haveli", the co-sharers to reach the staircase from their ground floor room will have to essentially use the "ravish" and thereby have access to the upper story. The trial court observed that the "ravish" is meant to be used only for the purpose of going from one room to another room. If it were not to be so, each room/house would require a separate staircase to reach the upper story. It was held that the same would apply to the tenants of the co-sharers. They could use which ever "ravish" is nearer to their rooms, through, of course, by causing minimum disturbance to other co-sharers.

23. If we analyze the findings of reversal recorded by the first appellate court in the light of the reasonings, given by the trial court, they are found lacking both in logic and reason. The first appellate court has not based its findings on the evidence but has been rather guided entirely by the inspection of the disputed "haveli" carried out by the Presiding officer himself. It has observed that the house of the plaintiff commences where the boundary of the house of the defendant no. 1 ends, and, then he (the Presiding officer) found evidence of the existence of a door earlier, dividing the two. If the "ravish" would be common, there would be no such door. On second floor also, he noticed the same just above the door on the first floor. At the same point, he noticed a wall on third floor. It was on that basis that the first appellate court concluded that "ravish" was not common/joint between the parties. Then, it went on observing that if "ravish" towards western side of the staircase of the house is seen, There is evidence that at one point of time door was fitted into the wall thereof because

bolt and screw were seen on such wall. On that basis, the Presiding officer of the first appellate court assumed that if on the "ravish" of the northern side also, where the rooms/house of the plaintiff ends, the door is fitted or it is presumed that the door must have been fixed there sometime in the past and if it is further assumed that in the "ravish" on the eastern side of the south-western leading to staircase also door was affixed sometime in the past, it can be said that those residing in the portion of the defendant no. 1 could not have used the "ravish" of the second floor at the other end of their house and especially the "ravish" falling opposite two rooms of the plaintiff. And they would have to divert to the staircase closer to their house to step down. It was further observed by the first appellate court that the defendants could reach the toilet situated at the mid level of staircase between the first and second floor by using the staircase in the south-western corner of the house, get down in the chowk and climb the staircase in the opposite corner to reach the toilet. They could enter their house through the common chowk by using the former staircase. In the opinion of the first appellate court, these were the reasonable conclusions looking to the situation of the "haveli" and considering that the "haveli" has got two common staircases, which could be used by any of the co-sharers, which they could use from the "ravish" facing their rooms/house. Lastly, it was observed that since the "ravish" on third floor has been closed by constructing a wall, it can be safely concluded that "ravish" on all the floors was not joint/common nor the documentary evidence prove that the "ravish" was common/joint between the parties. Observing thus, the first appellate court concluded that the "ravish" normally belonged to the person in front of whose room/house it was situated because it was meant for the purpose of facilitating his access to such room/house.

24. It is no doubt true that appeal is continuation of the proceedings of the suit and therefor even the appellate court is also equally entitled to carry out the inspection. This is the true position of law which is reflected if the provisions of order 18 Rule 18 of the CPC are analyzed in the light of Section 107 CPC. order 18 Rule 18 of the CPC inter-alia provides that the court may at any stage of a Suit inspect any property or thing concerning which any question may arise and where the court inspects any property or thing, it shall, as soon as may be practical, make a memorandum of any relevant facts observed at such inspection and such memorandum shall form a part of the record of the suit. Though there was no written application by any of the parties, the judgment of the first appellate court indicates that the Presiding officer made inspection on the request of the counsel for both the parties. But the record does not indicate whether any memorandum of such inspection was prepared by the Presiding officer.

25. Be that as it may, this court speaking through the chief Justice Shri K.N. Wanchoo (as His Lordship then was) in Chandraram Vs. Bhoma, held that the inspection note can be substituted as evidence for parties only when parties ask for it but where it is not clear that the defendant had categorically agreed to

abide by the result of the inspection, the inspection note cannot be a substitute for evidence of the parties. while relying on the judgments of Nagpur High court in AIR 1941 292 (Nagpur) and that of Bombay High Court in Amratlal Vs. Land Acquisition Officer, it was held as under:-

It has, therefore, to be seen whether in this case, the inspection was at the request of the parties and that they had said that they would not lead any evidence after the Judge had inspected the site. It appears that the plaintiff did make an application of this kind on 31-12-1946. There is, however, no application of the defendant to this effect. Learned counsel for plaintiff-appellant relies on the order of 31/12/1946 in this connection and says that the defendant had agreed to that position. The order sheet says that the plaintiff has prayed that the Court might inspect the locality and the defendant's counsel has no objection. The order-sheet then goes onto say that in such circumstances, there would be no necessity for evidence on either side. Unfortunately, it is not clear from the order-sheet whether the defendant had categorically agreed to abide by the result of the inspection. Under these circumstances, this argument on behalf of the appellant fails. But as I have already indicated, there was evidence on this record which the learned Judge completely overlooked. when that evidence is taken into account along with the inspection note, there can be no doubt that the plaintiff had proved that the "kund" had not been prepared according to the terms of the agreement...

26. In fact, the Bombay High court judgment in Amratlal, supra, on which reliance was placed by this court in Chandraram, supra, held that it is improper for a Judge to base its judgment solely on the impressions formed by him at the time of his local inspection and to come to the conclusion quite contrary to the evidence of the case.

27. It must be therefore held that the observations of a Judge at the time of inspection can be used only for the purpose of better following and understanding the evidence adduced in the case or to test its accuracy. But it is not the purpose of such inspection that it should be taken as substitute of evidence in the case or to contradict the evidence adduced before the Court so as to make it the foundation of the judgment. where the Judge making local inspection has considered the evidence of every one of the witnesses examined by either side and has made use of what he observed during the local inspection to understand and follow the evidence and to test its accuracy, his decision cannot be said to be vitiated. If, however, his decision has been based solely or mainly on his observation during the local inspection, it may well be that, and such judgment cannot be sustained. Even when Presiding officer of a court in the scope of Order 18 Rule 18 CPC carries out an inspection, he cannot decide the suit/appeal solely on the basis of his inspection report as he still acts as Presiding Judge of the court concerned in the capacity of an adjudicator and does not act as an arbitrator.

28. Analyzed in this light of the law on the subject, the findings recorded by the

first appellate court, belies the logic and to put it straight, borders on the absurdity. The findings have not been recorded on any cogent and legally admissible evidence but are rather based on surmises and conjectures. The findings are founded on imagination, and multi layer imagination at that. The learned Presiding officer has assumed the existence of one imaginary fact and has on that basis, gone on to imagine the existence of another fact and then curiously, third fact and thus built up an entirely new case, contrary to evidence, wherefor there was absolutely no justification. Findings recorded by the first appellate court are therefore wholly perverse, which no reasonable person of ordinary prudence could in the facts and evidence of the present case, reach.

29. The Supreme Court in *Dinesh Kumar Vs. Yusuf Ali*, held that second appeal u/s 100 of the CPC is maintainable basically on substantial questions of law and not on facts. However, if the High court comes to the conclusion that the finding of fact recorded by both the courts below are perverse, being based on no evidence or based on irrelevant material, the second appeal can be entertained. It would thus be permissible for the High court to reappraise the evidence.

30. Contention of the learned counsel for the defendant-appellant that since the plaintiff Gaindi Lai, in his statement before the trial court, relied on sale-deed executed by Fatehlal in his favour, partition deed of the house as also on the will by Gulab Bai in his favour and, all of them, to contend that the "ravish" in front of his house/rooms has been described as his personal and yet he failed to prove them, therefore an adverse inference should be drawn against him, needs to be upheld. It must be presumed that had the plaintiff produced all or any one of all these three documents, they would prove that the "ravish" in fact was joint/common of all the co-sharers.

31. The Supreme Court in *Gopal Krishnaji Ketkar, supra*, on which reliance has been placed by learned counsel for appellant, held that if a party in possession of best evidence, which would throw light on the issue in controversy, withholds it, the court ought to draw an adverse inference against him, notwithstanding that onus of proof does not lie on him. Party cannot rely on abstract doctrine of onus of proof or on the fact that he was not called upon to produce it.

32. Contention raised on behalf of the plaintiff-respondent that defendant-appellant has failed to prove how and in what manner Hari Kishan came to acquire part of the "haveli" that was gifted by him to Mst. Chhuttan Bai, the original defendant and mother of the defendant-appellant, also deserves to be rejected. In the gift deed itself, it is mentioned by Hari Kishan that he purchased this property in the auction, which took place pursuant to the judgment of the court of Munsiff dated 03.06.1940 titled *Mool Chand vs. Fatehlal*, for a sum of Rs. 109/-. Fatehlal was none other than the husband of the original defendant Chhuttan Bai and father of defendant-appellant Shanti Lal and therefore co-sharer in the disputed "haveli". Even otherwise, if a co-sharer had the right to use the "ravish", the same right would be acquired by some one whom he would sell his share of the "haveli". Perusal of the judgment of the court of Munsiff,

Jaipur, dated 14.07.1917 in the suit titled-Meetha Lal vs. Mahadev, with regard to same "haveli", a mention is made about "ravish" being put to use by all the parties.

33. The judgment of the first appellate court thus examined in proper perspective, makes it evidently clear that it is solely based on the inspection carried out by the learned Presiding Officer, who has completely discarded the evidence led by both the parties. Impugned judgment of the first appellate court thus is liable to be overturned. In the result, the appeal is allowed. The judgment and decree dated 06.12.1982 passed by learned Additional District Judge No. 5, Jaipur City, Jaipur, in civil Appeal No. 126/1978, is set-aside and the judgment and decree dated 28.06.1976 passed by learned Additional Munsiff No. 2, Jaipur City, Jaipur, in Civil Suit No. 564/1973, is restored.