

(1960) 11 KAR CK 0006
In the Karnataka High Court
Case No : Second Appeal No. 257 of 1954

T. Krishnaswami Rao and Others

APPELLANT

Vs

Dundappa and Others

RESPONDENT

Date of Decision : 18-11-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 18

Citation : AIR 1962 Kar 17

Hon'ble Judges : Mir Iqbal Husain, J

Bench : Single Bench

Advocate : T.V. Govindaraja Iyengar, for the Appellant;

Judgement

(1) This is the defendants' Second Appeal. Plaintiff respondent filed a suit for mandatory injunction for closing the windows O and P marked in the plaint plan. He contended that there was a wall between the house of the plaintiff and the defendants and that wall marked ABCD in the plan produced along with the plaint was a common wall and, therefore, defendants should not have raised the same or put up windows or ventilators in the upstairs portion. Defendants, on the other hand, contend that the disputed wall ABCD is not a common wall as alleged by the plaintiff but it is their execution wall. Therefore they were entitled to build on that wall up to any height.

They are also entitled to put up the window and ventilator in their own wall. The learned District Munsiff, Bellary, who tried this case, dismissed the plaintiff's suit but the learned District Judge Bellary upheld the plaintiff's contention and granted him a decree as prayed for. He ordered that the defendants have no right to put up the windows O and P or to interfere with the plaintiff's half right to the common wall ABCD and issued a mandatory injunction to remove the windows O and P as shown in the plan. Defendants have preferred an appeal against the said judgment and decree .

(2) The important point therefore that arises in this appeal is whether the wall

ABCD is the common wall as alleged by the plaintiff respondent or is the exclusive wall of the defendant as contended by them. If it is held that this is the exclusive wall, then they are entitled to build on it and also to open windows or ventilators as well. When the plaintiff comes up with the case that it is a common wall, naturally in the first instance the burden of proof is heavy on him to prove that allegation.

In support of his contention two documents have been produced in this case, Exhibit A-2 is a sale deed dated 19.10.1929 executed in favour of P.W.1 Rangamma, the predecessor-in-title of the plaintiff, Exhibit A-1 is the subsequent sale deed dated 17.7.1946 executed by the said Rangamma in favour of the plaintiff. Plaintiff, in his evidence, admits that there is nothing stated in the said sale deeds that the disputed wall is a party or common wall.

He also states that he did not make any inquiries about this suit wall, neither does he know who built the disputed wall. Therefore it is abundantly clear that the plaintiff has failed to establish that the wall in dispute is the common wall and if he fails to do so, it follows as a corollary that he has no right to object to the opening of the windows or the ventilators on the side of the wall as done by the defendant.

(3) P.W. 1, the vendor of the plaintiff is examined in the date. On the material point she does not support the plaintiff's case. She states that the disputed wall had already been built when she purchased the house - the very house to which the plaintiff now lays claim, she also states that Seshagiri Rao, the husband of defendant 6, might have built the disputed wall. There is further a significant statement made by her to the effect that when she wanted to put supports in this wall viz., ABCD and sought the permission of Seshagiri Rao, he objected to the same.

Therefore, she says she put a parallel beam and rested the rafters on it. This statement gives up the whole case of the plaintiff. On the side of the defendants, the important witness that has been examined is D.W. 2 Nagamma, widow of Seshagiri Rao. According to her evidence defendants' house was built by her husband Seshagiri Rao about 30 years ago and they built the upper story 15 years ago.

She also states that P.W. 1 Rangamma, the predecessor of the plaintiff asked for permission to put the beams in the wall and that her husband refused the same. It is needless to refer to the evidence of the neighbour who is examined as D.W. 1 in the case under the circumstances. The evidence discussed above leads to the conclusion that the wall in dispute viz. ABCD is not a common wall but the exclusion wall of the defendants and if that is so, it also follows, that the defendants can build upon the said wall and open windows and ventilators.

(4) The learned District Judge bases his discussion mainly on his personal inspection. That part of the judgment which is relevant for the purpose runs thus:

"There was a personal inspection made by necessary after hearing both sides on 7.10.1950 and on this occasion, I noted that the rafters on which the roof of the plaintiff's house rests were protruding into this common wall throughout including the portion along D.W. 1's house on the other side. The facts noticed by me at the personal inspection show that the plaintiffs case that the wall is common to him and the defendants is true that the evidence produced on the side of the defendants cannot be true and that the wall is not the exclusive property of the defendants".

This indicate, that the learned judge has given importance by his personal inspection of the spot and to that he has observed at that time. in fact, he uses his observation as against the evidence in the case. This is not warranted either in the procedure or in law.

(5) Personal inspection by the presiding judge is set out in Order 18 Rule 18 of the CPC which runs as follows:-

"The Court May at any stage of a suit inspect any property or thing concerning which any question any arise. No where it is laid down that the observation of the judge at the time of the inspection could be substituted as evidence ion the case and a judgment based on the same. In fact, there are certain cases which discourage such a procedure following the case of the Privy Council of Kessaowji v. G.I.P. Rly. Co. H.R. 31 Bom 381 (P.C.) The learned Judges of the Bombay High Court inspected the spot to find out whether the plaintiff in the case is entitled to got damages by the fall from a train and based their decision on those observations. This course was disappeared by their Lordships of the Privy Council. They held that the case was decided not on the testimony given as to what took place on the night of the accident but by judges" observation s of what they saw on another note altogether.

(6) In a Bench decision of the Calcutta High Court in Raj Chandra Banik and Others Vs. Iswar Chandra Banik and Others, was held as follows:-

"Though the present Code empowers the Court to go on local inspection of any property in respect of which it is called upon to decide a question in controversy, it is still the duty of the Court not to make the result of each inspection the foundation of its judgment which must be based upon evidence adduced by the parties, it does not entitle the judge to put his view obtained by means of such inspection in place of evidence. The Judge is to hold such inspection for the purpose of better following and understanding the evidence adduced before him or to test its accuracy. The Code nowhere lays down that the result of a local enquiry must be placed on record".

The limits to which the views of the judge on inspection could be used are laid down in this decision. They 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 to be substituted as evidence in the case or to contradict the evidence placed before Court and make it the foundations of the

judgment.

Similar at the observations in the cases of Mohammed Ishaq and Others Vs. Balmakund Lal and Another , Guju Mahto v. Jogendra Nath, AIR 1935 Pat 457, Abdul Baqi Vs. M. Fakhrul Islam and Others, and Hari Prasad Sahu Vs. Ropna Kharia, .

To my mind it appears that a salutary rule of law has been laid down in these cases, otherwise there is every possibility of the personal inspection of the Court being substituted as evidence in the case to the defendant of the parties because of the fact that they have no right to test the correctness of the learned Judge's observation at the time of the inspection by means of cross-examination.

(7) In the result, this appeal is allowed. The decree and judgment passed by the learned District Judge are set aside and those of the District Munsiff restored. As the respondents are underrepresented, I order that each party should bear their respective costs of this appeal.

(8) HE/MF.

(9) Appeal allowed.