

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH, JAIPUR

O R D E R

S.B. Civil Second Appeal No.103 of 1989.

Badri Prasad son of Babu Lal and Another

Versus

Munna Lal son of Hari Charan Lal

Date of Order :::: 30/11/2006

Hon'ble Mr. Narendra Kumar Jain, J.

Mr. Rajesh Chaturvedi and

Dr. P.C. Jain, Counsel for defendant-appellants.

Mr. Amit Sharma and

Mr. J.P. Goyal, Counsel for plaintiff-respondent

By the Court :

Heard learned counsel for both the parties.

This Court vide order dated 08th of September 1989 while admitting the second appeal, formulated the following substantial questions of law involved in this second appeal :-

"WHETHER, the disputed way marked ABCD in the map annexed with the plaint is public way".

"WHETHER, the burden of issue No.1 could be shifted on defd and adverse inference can be drawn against deed.

Briefly stated the facts of this second appeal are that the plaintiff Munna Lal, filed a suit for permanent injunction and injunction in mandatory form directing the defendants to remove the "wall" marked as O and S and "gate" marked as D in the map Exhibit-9 appended with the suit.

It was pleaded in the plaint that the defendant No.1 purchased one house on 30.06.1968 from Gulab Singh son of Lal Hans Babu, Ram Charan and Rambharosi through registered sale deed, which is situated at Mohalla Chapetibara and there is one public way towards the western side of the house. The defendant NO.1 took a permission from the Municipal Board, Badi, District Dholpur and raised constructions on the house. The defendant left some vacant land towards the eastern side of his house, which is described as A.B.E.F. It was further pleaded that towards the east side of the land marked as A.B.E.F. there is way, which is marked as A.B.C.D., the width of which is 4 ft. towards A and D and 3 ft. towards B and C. The plaintiff further pleaded that there was one house of Gulab Singh son of Hargovind towards the east side of the way marked as A.B.C.D., which was purchased

by the plaintiff through registered sale deed dated 25.02.1970. The plaintiff obtained a permission for raising constructions thereon from the Municipal Board, Badi. The defendant Nos.1 and 2 are the son and father. They started digging foundation on 03.07.1973 at the place O. T. and X.F. shown in the map (Exhibit-9) and raised "wall" of 6 ft., in height at place O. T. and put a door. The said way is a public way and the defendants have no right to raise any constructions over it. Therefore, it was prayed that the wall as well as gate ordered to be removed and the defendants be further restrained not to raise any construction in the public way marked as A.B.C.D.

The defendants contested the suit by filing written statement, wherein it was pleaded that it is correct that the defendant no.2 Ashok Kumar has purchased his house from Gulab Singh, Ram Charan, Rambharaso and Badri Prasad, through registered sale deed dated 30.06.1968, which was registered on 02.07.1968. There is a public way towards west side, but so far as the way towards the east side is concerned, the same is joint of Gulab Singh and Badri Prasad from whom he purchased the house. It was denied that the way described as A.B.C.D. is a public way, but it was pleaded that the said land is a joint land of the defendants and the plaintiff has no right to open

his window or gate etc., in the said land.

On the basis of the pleadings of the parties, the learned Lower Court framed four issues, which are reproduced in the impugned judgment passed by both the Courts below. Issue No.1 is as to whether the land marked as A.B.C.D. in the map (exhibit-9) annexed with the plaintiff is a public way or not?. Both the parties produced oral as well as documentary evidence.

The learned Lower court decided Issue Nos.1 to 3 against the plaintiff and held that the disputed way is not a public way and in view of the finding in respect of Issue Nos.1 to 3, the suit of the plaintiff was dismissed. Being aggrieved with the same, an appeal was preferred by the defendants and the First Appellate Court vide impugned judgment and decree dated 01.04.1989 set aside the judgment and decree dated 29.08.1980 passed by the Lower Court and allowed the appeal of the defendants and directed the defendants to remove the wall and door marked as O, S and D in the map (Exhibit-9). Under these circumstances, the present second appeal was preferred by the defendants.

Learned counsel for the defendant-appellants contended that from the finding of the Lower Court, it was clear that the disputed way i.e. A.B.C.D. was not a public way, but it was joint land of the defendants. The learned First Appellate Court without considering

the reasoning given by the learned Lower Court in respect of Issue No.1 wrongly reversed the finding of the Lower Court. He further contended that although the First Appellate Court has recorded a finding that from the evidence, it is proved that there is no door of the plaintiff towards the disputed way, whereas the door of the defendant Badri Prasad towards the disputed way is proved, but still merely on the basis of surmises and conjecture and by wrongly shifting the burden of proof of the Issue No.1 on the defendants, wrongly decided Issue No.1 against defendants. Learned counsel for the defendant-appellants also contended that the burden of proof of Issue No.1 was solely on the plaintiff and it could not have been shifted on the defendants. He also referred para no.1 of the plaint, wherein the plaintiff himself described the disputed way as a public way towards the western side of the house of the plaintiff, therefore, it was for the plaintiff to prove the disputed way as a public way.

Per contra, learned counsel for the plaintiff-respondent contended that the learned Lower Court wrongly decided the Issue No.1 against the plaintiff, as from the evidence available on record, it was proved that the disputed way was a public way. He contended that the learned First Appellate Court was correct in holding that the disputed way is a public way and the

defendant has no right to put any obstructions in it by putting a wall and door. The learned Appellate Court has rightly passed an order for removal of wall and door raised on the disputed way i.e. A.B.C.D. He further contended that the learned First Appellate Court was right in shifting the burden of proof of Issue No.1 on the defendants.

I have considered the submissions of learned counsel for both the parties and minutely scanned the impugned judgments and records of both the Courts below.

The sole question involved in the present case is as to whether the disputed way, marked as A.B.C.D. in the map (Exhibit-9) annexed with the plaint, is a public way or it is joint land of the defendants. The learned Lower Court held that the plaintiff has failed to prove that it is a public way, therefore, he dismissed the suit, whereas the First Appellate Court held that it is a public way and consequently decreed the suit of the plaintiff.

Issue No.1 in the present case is as to whether, out of land marked as A.B.C.D. in the plaint annexed with map (Exhibit-9), the portion marked as O.S.Y.X., is a public way? Learned Lower Court while considering Issue No.1 considered the oral and documentary evidence including sale-deed Exhibit-1 and

2 and Exhibit A and Exhibit A-1/1.

From the Exhibit-9 the map produced by the plaintiff himself, it reveals that no window or gate has been shown towards disputed way, whereas the gate of the defendants has been shown towards the disputed way.

The case of the defendants from the very beginning is that the disputed way is a joint land of Gulab Singh and Badri Prasad from whom he purchased the house, therefore, it is a joint land of the defendants and the plaintiff has no concerned whatsoever in it.

The material witnesses in the present case were Gulab Singh, Roop Singh and Badri Prasad, but none of these witnesses were examined on behalf of the plaintiff, who could have proved that the disputed land was not a joint land, but it was a public way. The First Appellate Court while deciding Issue No.1 has observed that in case the plaintiff could not prove the disputed way as a public way, then it was a duty of the appellant to prove that it was not a public way and it was a joint land. The defendant also did not produce the witnesses i.e. Badri Prasad and Roop Singh who could have proved the disputed way as a joint land of the defendants.

The reasonings given by the First Appellate Court for reversing the finding of lower Court in

respect of Issue No.1, in para nos.8 to 12 of the impugned judgment dated 01st of April 1989 are absolutely illegal and without jurisdiction. The burden of proof of issue no.1 was on the plaintiff and it could not have been shifted on the defendants. The Appellate Court committed serious illegality in shifting the burden to prove issue NO.1 on the defendant. Although, the learned First Appellate Court has decided Issue No.1 in favour of the plaintiff, but while deciding Issue No.1 has observed as under :-

'यह तथ्य हालांकि साबित है कि वादी का इस ओर कोई दरवाजा नहीं था मगर बद्रीप्रसाद का दरवाजा होना साबित है।'

The above observations of the First Appellate Court shows that the right of defendant in disputed way was recognized and plaintiff's right was not recognized by the First Appellate Court also, therefore, the finding of the Lower Court in respect of Issue No.1 could not have been reversed.

Section 101 of the Indian Evidence Act, 1872 is relevant in the matter, which reads as under :-

"101. Burden of Proof.-- Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

So far as the present case is concerned, it is clear from the contents of the plaint itself that the plaintiff came with a case that the disputed way is a public way and the defendants have no right whatsoever in it. Therefore, looking to the pleadings as well as the evidence of the plaintiff it was clear that the burden of proof in respect of Issue No.1 was on the plaintiff and it was wrongly shifted on the defendants by the First Appellate Court.

The First Appellate Court while deciding Issue No.1 has observed as under :-

'प्रतिवादीगण की ओर से ऐसी कोई साक्ष्य पेश नहीं की गई है कि यह रास्ता केवल बद्रीप्रसाद और प्रतिवादीगण तथा उनके पूर्वाधिकारियों के ही काम आता था और किसी को इस रास्ते पर आने का अधिकार नहीं था। जब यह बात साबित नहीं हुई है तो स्थान ए, बी, सी, डी को प्रतिवादीगण तथा बद्रीप्रसाद का मुस्तरका रास्ता मानने का कोई आधार नहीं था। विद्वान् अधीनस्थ न्यायालय ने यह बात तो सही मानी है कि इस मामले के बेहतरीन गवाह बद्रीप्रसाद, गुलाबसिंह और रूप सिंह थे जिनके मकान इस रास्ते के पर्व में थे। इन गवाहों में से किसी को भी वादी ने पैश नहीं किया है लेकिन इस कारण वादी के विरुद्ध कोई विपरीत क्यास नहीं निकाला जा सकता। यदि वादी ने इनको पेश किया तो प्रतिवादीगण इनको पेश कर सकते थे और मेरे विनम्र विचार में तो यह बात प्रतिवादीगण के लिए अधिक आवश्यक थी कि वह उनको पेश करते।'

The aforesaid observations of the First

Appellate Court make it clear that the entire burden of proof of Issue No.1 was shifted on the defendants, whereas looking to the controversy involved in the present case and the pleadings of the plaintiff, the same could not have been shifted on the defendants and it was a duty of the plaintiff to prove the Issue No.1 that the disputed land was a public way. The Learned trial Court has considered the evidence of the case in detail and rightly recorded a finding in respect of the Issue No.1 that the plaintiff failed to prove the disputed way is a public way, therefore, the question No.1 formulated in the case is decided in favour of the defendants and it is held that the disputed way marked as A.B.C.D. particularly the area marked as O.S.A.Y. is not a public way. The question No.B is also decided that the burden of issue No.1 was on the plaintiff and it could not have been shifted on the defendants.

In view of aforesaid discussions, the second appeal is allowed. The impugned judgment and decree passed by the First Appellate Court dated 01.04.1989 is set aside and the judgment and decree dated 29.08.1980 passed by the Lower Court is restored.

There shall be no order as to costs.

(Narendra Kumar Jain) J.

ashok/

