

**Before Anil Kshetarpal, J.**

**RAJINDER KUMAR** —Appellant

*versus*

**RAM SAROOP** —Respondent

**RSA No.1935 of 2017**

March 16, 2020

A) *Civil Procedure Code, 1908—S. 100—Second appeal—Whether a purchaser/owner has a right to extend projection on first floor beyond area purchased by him and that also, over a public street? — Held, No—Once a co-owner of piece of land/plot decides to develop same into a residential or commercial area, then, certain space has to be left for common utility.*

B) *Civil Procedure Code, 1908—S. 100—Second appeal—Whether a developer who has carved out a market and kept certain passage for common use and described same in sale deed as street can subsequently, claim such common area for his exclusive use? — Held, No—Once some area earmarked for common utility, thereafter, owner cannot claim any exclusive right over area so reserved or earmarked for common utility.*

*Held that, once a co-owner of a piece of land/plot decides to develop the same into a residential or commercial area, then, certain space has to be left for common utility. Once some area has been earmarked for common utility, thereafter, the owner cannot claim any exclusive right over the area so reserved or earmarked for common utility. On careful perusal of Ex.D1 i.e. the layout plan, it is apparent that the defendant had developed a commercial area by constructing seven shops. The entire plot is abutting two public passages towards north and west side of the plot. In order to give excess to three shops which have been constructed, a passage was left towards eastern side of the plot. It is apparent that towards eastern side of the plot, the defendant is not owner of any other property after the space measuring 5 feet x 23 feet. The property on the further eastern side belongs to the Panchayat.*

(Para 18)

Munish Bhardwaj, Advocate  
*for the appellant* (In RSA No.1935 of 2017)  
*for the respondent* (In RSA No.3978 of 2018)

Lekh Raj Sharma, Advocate  
for the respondent (In RSA No.1935 of 2017)  
*for the appellant* (In RSA No.3978 of 2018)

**ANIL KSHETARPAL, J.**

**CM-10556-C-2018 in RSA-3978-2018**

(1) For the reasons stated in the application, which is duly supported by an affidavit, delay of 9 days in re-filing the present appeal is condoned.

(2) Application is allowed.

**CM-10557-C-2018 in RSA-3978-2018**

(3) For the reasons stated in the application, which is duly supported by an affidavit, delay of 253 days in filing the present appeal is condoned.

(4) Application is allowed.

**Main cases**

(5) This judgment shall dispose of two appeals bearing RSA No.1935 of 2017 and RSA No.3978 of 2018. Both the appeals have arisen from a suit and counter claim disposed of by the learned trial Court as well as by the First Appellate Court by a common judgment.

(6) The questions which arise for determination are as follows:-

- 1) Whether a purchaser/owner has a right to extend the projection on the first floor beyond the area purchased by him and that also, over a public street?
- 2) Whether a developer who has carved out a market and kept certain passage for common use and described the same in the sale deed as a street can subsequently, claim such common area for his exclusive use?

(7) For convenience, the parties would be referred to their original status in the suit.

(8) Ram Saroop-defendant was owner of a piece of land. He developed a market by carving out plots for seven shops and named the market as 'Sharda Market'. There is a public passage towards west and north side of the property. Ram Saroop-defendant sold a constructed shop/room to the plaintiff vide sale deed dated 19.12.1994. A look at the layout plan proves that there is an open space having width of 5

feet towards east of the market which is being described as a private passage. The length of the total strip is 23 feet.

(9) The plaintiff-Rajinder Kumar, after purchase of the shop which was single storey, has constructed first floor by extending the projection by 2½ feet over the open space which is claimed by the defendant to be a private street. The projection has been constructed towards the main road as well as in the street.

(10) The plaintiff claims that the property on the eastern side is a street and, therefore, he has a right to an open door and windows towards the eastern side.

(11) On the other hand, the defendant claimed that the property on the eastern side is his private property which has been kept as a private passage and therefore, the plaintiff has no right to open door/windows towards eastern side and also has no right to construct a projection which covers half of the width of the private passage.

(12) Learned trial Court, on appreciation of evidence, found that towards the eastern side, the open space is a public street and therefore, the plaintiff has no right to construct the first floor and second floor by extending the same by 2½ feet in width over the public street. Thus, the Court dismissed the suit filed by the plaintiff whereas allowed the counter claim filed by the defendant.

(13) Two appeals were filed before the First Appellate Court, one by the plaintiff and other by the defendant. Learned First Appellate Court, after re-appreciating the evidence, partially allowed the appeal filed by the plaintiff while concluding a finding that the plaintiff has a right to open his door/windows and discharge rainy water towards the aforesaid street. However, learned First Appellate Court dismissed the appeal filed by the defendant while rejecting his claim that the area of 5 feet x 23 feet is his exclusive property.

(14) This Court has heard learned counsel for the parties at length and with their able assistance, carefully peruse the judgments passed by the Courts below and the record.

(15) Learned counsel for the plaintiff has submitted that since it is a public street, therefore, he has a right to extend the overhanging projection by 2½ feet.

(16) Per Contra, learned counsel for the defendant has submitted that the plaintiff was not sold any right, title or interest in the aforesaid area of 23 feet x 5 feet and therefore, the plaintiff has no right

to open any door/window or install a pipe for discharge of rainy water towards theaforesaid piece of land.

(17) This Court has analyzed the arguments of learned counsel for the parties. However, finds no substance therein.

(18) Once a co-owner of a piece of land/plot decides to develop the same into a residential or commercial area, then, certain space has to be left for common utility. Once some area has been earmarked for common utility, thereafter, the owner cannot claim any exclusive right over the area so reserved or earmarked for common utility. On careful perusal of Ex.D1 i.e. the layout plan, it is apparent that the defendant had developed a commercial area by constructing seven shops. The entire plot is abutting two public passages towards north and west side of the plot. In order to give excess to three shops which have been constructed, a passage was left towards eastern side of the plot. It is apparent that towards eastern side of the plot, the defendant is not owner of any other property after the space measuring 5 feet x 23 feet. The property on the further eastern side belongs to the Panchayat.

(19) Learned First Appellate Court has positively found that in the sale deed dated 19.12.1994, towards eastern side of the shop purchased by the plaintiff, the open space has been described as a street. The correctness of the aforesaid fact is not disputed before this Court. Once the open space on the eastern side has been described as a street, the defendant-Ram Saroop cannot claim any exclusive right thereon. The aforesaid space has been dedicated by the defendant-Ram Saroop as a common area. Still further, on careful perusal thereof, it is apparent that the aforesaid passage is not only abutting the property of the plaintiff-Rajinder Kumar but is also extending towards two other shops with a view to provide a passage to the owners of those shops. In the layout plan Ex.D1 itself, it has been depicted that two other shops have two openings, one towards western side and second towards eastern side. In these circumstances, the defendant has no right to stop the plaintiff to open door and windows and install a pipe for discharge of rainy water.

(20) However, the plaintiff-Rajinder Kumar has no right to construct first floor in a manner so as to encroach upon 2½ feet wide area overhanging above the aforesaid street towards eastern side. In the absence of a specific right or custom or usage, the plaintiff cannot, as a matter of right, claim that he has entitlement to extend the area of the plot on the Ist and IInd floor by extending the roof. Still further, it is apparent that half of the common passage has been covered by

constructing a room on the first floor by extending the roof of the ground floor. Such act on the part of the plaintiff is illegal.

(21) Learned counsel for the plaintiff has submitted that since it is a blind street going only upto the depth of three shops, therefore, the plaintiff has a right to construct first floor in the manner in which it has been constructed.

(22) This Court has considered the submissions. However, finds no merit therein.

(23) Keeping in view the aforesaid facts, the questions of law as framed are answered in the following manner:-

(24) Question No.1 is answered against the plaintiff by declaring that the plaintiff had no right to extend the area of the plot by constructing an overhead projection and raising construction of the first floor by increasing the size of the plot. Similarly, the defendant has no right to close the doors/windows and demolish the water drainage pipe installed by the plaintiff towards the aforesaid street.

(25) Hence, both the Regular Second Appeals are dismissed.

(26) All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

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*Ritambhira Rishi*