

Habib Fatima and Others

Vs

Mohd. Shafi

Civil Appeal No. 2698 of 1984

(L. M. Sharam, Dr. T. K. Thommen JJ)

22.09.1989

JUDGMENT

THOMMEN, J. –

1. This is an appeal by special leave arising from the judgment and decree dated September 29, 1983 of the Allahabad High Court. The present appellants are the legal representatives of the plaintiff in Suit No. 254 of 1970 which was a suit for perpetual injunction. That suit was dismissed by the trial court, but on appeal by the plaintiff, it was decreed by the first appellate court. That decree was challenged in second appeal by the present respondent-defendant. The High Court by the impugned judgment allowed his appeal.

2. The plaintiff had also filed Suit No. 242 of 1973 against the present respondent, Mohd. Shafi, his son, Fazal Haq, Ishwar Singh and Kunwar Singh (defendants 1 to 4 respectively). That suit was for cancellation of a sale deed executed in favour of Fazal Haq by Ishwar Singh and Kunwar Singh. The suit was dismissed by the trial court, but on appeal by the plaintiff, the first appellate court came to certain findings in favour of the plaintiff as regards his title and possession and remanded the case to the trial court for fresh disposal after trial of certain additional issues framed by the court. Against the order of remand, the defendants filed an appeal in the High Court. That first appeal from order was also allowed by the High Court by the impugned judgment. The High Court held that the remand was unnecessary and disposed of the suit itself on the merits. In doing so, both the second appeal and the first appeal from order were heard together by the High Court by consent of parties, and, as observed by the High Court, the two suits for all practical purposes had been consolidated.

3. The appellants have brought the present against the judgment and decree of the High Court only insofar as it concerns Suit No. 254 of 1970. There is no challenge against the judgment to the extent it relates to Suit No. 242 of 1973.

4. Allowing the defendant's appeal, the High Court came to certain definite findings in favour of the plaintiff as regards his title and possession. The High Court found that the plaintiff was the owner in possession of the suit property at the time of the institution of the suit, and that the defendant had encroached upon the property during the pendency of the proceedings in the courts below and construed certain rooms. The High Court further found that although the plaintiff was in law entitled to the relief sought for peaceful and undisturbed enjoyment of the property, it would be an economic waste to demolish the structures already constructed by the defendant, albeit during the pendency of the proceedings, and it would be just and proper to allow the defendant to retain possession of the area which he had constructed upon on payment to the plaintiff by the defendant of a sum of Rs.

5000 as compensation. The plaintiff is aggrieved by his direction. Hence the present appeal.

5. Counsel for the plaintiff points out that the High Court has failed to come to a categorical and precise finding as regards the exact area encroached upon by the defendant by constructing three shop rooms.

6. The High Court says :

"the plaintiff is the owner of the house on plot No. 1122 and the land of plot No. 1123 was the Agga or Sehan Posh Darwaja of the plaintiff's house on plot No. 1122 but at the same time it could also not be denied that the defendant had some right of passage through this land by reason of his ownership of the house of plot No. 1125."

The High Court further says that the suit giving rise to the second appeal related to plot No. 1115. That was the area which had been encroached upon by the defendant during the pendency of the proceedings. The defendant constructed a total length of three shops in that property. The defendant's construction was partly on plot No. 1123 having "the Agga or Sehan Posh Darwaja of the plaintiff's house on plot No. 1122" and partly on plot No. 1115 relating to which the plaintiff sought injunction. These properties have not been clearly identified by the High Court. Although the plaintiff had described them by boundaries and numbers, no properly prepared map to identify them has been brought on record. The exact area encroached upon is not clear from the judgment of the High Court.

7. The appellant's counsel submits that the High Court having found both title and possession with the plaintiff at the material time, there was no justification to direct, as it did, that :

"the constructions already made by Mohammad Shafi or Fazal Haq... on plot No. 1123 and partly on plot No. 1115 shall not be demolished..."

8. The High Court held that the construction by the defendant or by his son should not be demolished and the plaintiff should be compensated for it in the sum of Rs. 5000. It further held that neither the plaintiff nor the defendant should raise any further construction on the remaining open land in plots Nos. 1115 and 1123 and that

"all the parties are restrained by a perpetual injunction to that effect and the land shall be the joint Sehan land and passage of the parties to and from the municipal road as owners of the house on plots Nos. 1122, 1125 and 1124 with the reservation that according to the plaintiff's case the house on plot No. 1124 was allotted on partition and belongs to this brother Mohammad Naseem who is not a party to the present litigation. The sale deed dated July 12, 1969 executed by Ishwar Singh, defendant 3 and Kunwar Singh, defendant 4 in favour of Fazal Haq defendant 1 shall be deemed to be ineffective as against the plaintiff to that extent."

9. The appellant's counsel further submits that the High Court having found that both the title and possession were with the plaintiff at the material time, the plaintiff is not liable to be compelled to part with his legal rights and accept compensation against his will, however reasonable it might appear to be. He says that the rule of equity requires that no person should be allowed to take advantage of his wrongful acts committed during the pendency of the suit. In any view of the matter, the sum of Rs. 5000 which the High Court directed the defendant to pay to the plaintiff as compensation, he says, is far too meagre considering the extent of the land encroached upon.

10. There is considerable force in the submissions on behalf of the plaintiff that the directions of the High Court are not precise in regard to the area to which they applied. There is also force in the submission that the plaintiff having been found to be the owner in possession at the material time, he was unjustifiably not protected by an appropriate order which he had sought against the defendant in respect of the area encroached upon by the defendant during the pendency of the suit.

11. These weighty arguments deserve to be properly examined, but we do not wish to express any final view on their merits. In our opinion, these matters should be reconsidered by the High Court after hearing the parties. Accordingly we set aside the judgment and decree under appeal insofar as they relate to Suit No. 254 of 1970 and direct the High Court to re-examine the questions involved and come to a fresh finding. It will be open to the High Court to allow the parties to adduce fresh evidence and amend their pleadings appropriately on the questions indicated by us. The appeal is allowed in the above terms. In the circumstances of this case, we make no order as to costs.

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