

Vinay Krishna

Vs

Keshav Chandra and another

Civil Appeal No. 3654 of 1983

(S. C. Agrawal, S. Mohan JJ)

06.03.1992

JUDGMENT

1. The donor of the appellant Smt. Jamuna Kunwar filed suit No. 23/63 for a declaration of the title with respect to three properties bearing Nos. 51, 52 and 53 Civil Lines, Bareilly. The defendants Keshav Chandra and Jagdish Chandra are her sons. It appears that Keshav Chandra filed Suit No. 46 of 1956 on the file of learned Civil Judge, Bareilly claiming a share in the properties described in the plaint schedule attached thereto against Smt. Jamuna Kunwar and his two brothers Jagdish Chandra and Gokul Chandra. A compromise was entered into between the parties. Based on the compromise the Civil Judge, Bareilly passed a decree dated 26-2-1960. The relevant clause in the compromise which has a bearing in this case reads as follows:

"The income from the entire disputed property will be received by Smt. Jamuna Kunwar defendant No. 3 for her entire lifetime. She will have the absolute right to spend the income. In the disputed property, after excluding the property worth Rs. 20,000/- the plaintiff and defendants Nos. 1 to 3 have equal shares i.e. every one is the owner of 1/4th share."

The decree passed on this compromise to the following effect:

"1. The income from the entire disputed property will be received by Smt. Jamuna Kunwar defendant No. 3 for her entire lifetime. She will have the absolute right to spend this income. In the disputed property, after excluding the property worth Rs. 20,000/ (twenty thousand) the plaintiff and the defendants Nos. 1 to 3 have equal shares i.e. every one is the owner of one-fourth share.

2. The defendant No. 3 Smt. Jamuna Kunwar is the absolute owner of the above mentioned property worth Rs. 20,000/(Twenty Thousand) and her own above mentioned share in the property.

3. Smt. Jamuna Kunwar will remain in possession and will manage the entire disputed property for her lifetime."

Based on this decree the suit was filed for declaration with reference to Bungalows Nos. 51, 52 and 53 which were valued at Rs. 20,000/- as seen from the above decree.

2. The specific case of the plaintiff as averred in the plaint was that she was in exclusive possession of these three bungalows. In para 8 of the plaint it was stated that "the plaintiff is the sole and absolute owner of the properties bearing Nos. 51, 52 and 53, Civil Lines, Bareilly as described above and she is entitled to peaceful enjoyment of her properties without hindrance from frustrating defendants 1 and 2 and these defendants have no. right, interest or title whatsoever in these properties". The prayer was to the following effect:

"That the plaintiff respectfully prays the Hon'ble Court may be pleased to declare that the plaintiff is the full and absolute owner in possession of the properties Nos. 51, 52 and 53 Civil Lines, Bareilly fully described in para 6 above to the exclusion of the defendants and a decree declaring the above rights interest and title is in the said properties Nos. 51, 52 and 53 Civil Lines, Bareilly, be passed in favour of the plaintiff against defendants with costs of the suit or such other relief be granted to the plaintiff to which she may be found entitled to on the merits of the case".

3. In the written statement of the first defendant in paragraph 8 of the Additional Pleas it was stated thus:

"The plaintiff is in the exclusive possession of the properties in suit. The present suit is barred under S. 42 of the Specific Relief Act". In the additional pleas in paragraph 7 of the written statement, the second defendant averred that "the suit is barred by S. 42 of the Specific Relief Act as the plaintiff has never taken judicial possession over the shares of the other co-sharers of the properties mentioned in the suit". In the additional written statement of defendant No. 1 in paragraph 6 it was stated that "the plaintiff is out of possession of the properties in suit".

4. The trial Court dismissed the suit. It appears certain other suits also came to be clubbed along with this suit and all of them were dismissed. Thereupon the plaintiff preferred the first appeal No. 446 of 1968. Pleading appeal Jamuna Kunwar executed a deed of gift dated 10-6-68 of the suit properties. Hence, he was added as the second plaintiff. The Division Bench of the High Court allowed the appeal with reference to properties Nos. 51 and 53. While as regard property No. 52 it was held that bar under S. 42 of Specific Relief Act would come into play as the property has not been in exclusive possession of the plaintiff. It also considered that merely because Suit No. 23/62 was consolidated that will not militate against the bar under S. 42 of the Specific Relief Act.

5. In so far as the decree in relation to properties Nos. 51 and 53 are concerned, Keshav Chandra and others sought special leave from this Court in SLP (C) No. 5348/90, that was dismissed on 4-11-1980.

6. Presently, the second plaintiff has come up by way of civil appeal.

7. Learned counsel for the appellant would urge in so far as property No. 52 is concerned, the case of the plaintiff is that apart from their being tenants, the defendants were in permissive possession. In such a case, the Court is not powerless to grant the relief in order to render justice. In fact that principle was adopted in *Md. Aftabuddin Khan v. Chandan Bilasini*, AIR 1977 Ori 69 that is commended to the Court.

8. The next submission of the learned counsel is that Section 42 (present Section 34) of the Specific Relief Act is not exhaustive. Therefore, even outside the purview of Section 42, there could be a

declaration as laid down in *Supreme General Films Exchange Ltd. v. Brijnath Singhji Deo*, (1975) 2 SCC 530 : (AIR 1975SC 1810). The Court ought to have granted at least with reference to the portions in which the plaintiff has been in possession. These are the only submissions made before us.

9. The learned counsel for the respondent would urge that the specific case of the plaintiff was that she was in exclusive possession. In defence, it was averred in no uncertain terms that Section 42 of the Specific Relief Act will be a bar. The Courts below have found concurrently that concerning this House No. 52, Civil Line, Bareilly she was not in exclusive possession. Therefore, now for the plaintiff to raise the plea of permissive possession is impossible. That was not the case put at any point of time. On the contrary the declaration was sought With reference to the entire property. In these circumstances, the proviso to section 42 will take away the discretion of the Court with regard to the grant of declaratory decree.

10. *Md. Aftabuddin Khan's case* (AIR 1977 Orissa 69) (supra) itself has suggested that the plaint ought to be amended. Nothing would have been easier for the plaintiff appellant than to have the plaint amended seeking a prayer for possession as well. For reasons best known that was not done.

11. *Supreme General Films Exchange v. Brijnath Singhji Deo*, (1975) 2 SCC 530 : (AIR 1975 SC 1810) has no application at all. This is a case in which the declaration is sought with reference to title. Such a case is governed only by Section 42 of the Specific Relief Act. That being the case it is not possible for the appellant to claim a declaration with reference to only that portion of which she was in possession.

12. We have carefully considered the above arguments. We are clearly of the view that bar under Section 42 of the Specific Relief Act would undoubtedly operate in this case. 'We may add that present Section 34 is in pari materia. Section 42 of the Specific Relief Act, 1877 reads as under:

"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief Provided that no Court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title omits to do so.

13. From the reading of the plaint it is clear that the specific case of the plaintiff Jamuna Kunwar was that she was in exclusive possession of property bearing No. 52 as well. She thought that it was not necessary to seek the additional relief of possession. However, in view of the written statement of both the first and the second defendant raising the plea of bar under Section 42, the plaintiff ought to have amended and prayed for the relief of possession also. In as much as the plaintiff did not choose to do so she took a risk. It is also now evident that she was not in exclusive possession because admittedly Keshav Chandra and Jagdish Chandra were in possession. There were also other tenants in occupation. In such an event the relief of possession ought to have been asked for. The failure to do so undoubtedly bars the discretion of the Court in granting the decree for declaration.

14. The plea of permissive possession is not stated anywhere in the plaint. Therefore, we cannot permit at this stage such a plea to be raised. In *Md. Aftabuddin Khan's case* (AIR 1977 Orissa 69) (supra) what was held is to the following effect (para 15):

"Long arguments had been advanced before us that a suit merely for a declaratory relief when the plaintiffs were out of possession was not maintainable. Reliance had been placed on the provisions of Section 34 of the Specific Relief Act. While Mr. Dutta contended that the said bar applied to the suit, Mr. Mahapatra for the respondent claimed that it was not a suit covered by Section 34 of the Specific Relief Act. It is true that the plaintiffs had alleged that they were still in possession notwithstanding the alienation. The Court, however, found that plaintiffs were not in possession. Undoubtedly, plaintiffs were obliged to ask for recovery of possession in order to have an effective decree. Mr. Mahapatra's contention that the bar of Section 34 of the Specific Relief Act would not arise where in the plaint there is an assertion that possession is with plaintiff though as a fact it is not, does not appeal to us as a sound proposition in law. Finding this defect and relying upon the general prayer in the plaint and keeping in view the power of the Court to grant such reliefs as a party before it may be found entitled to, the Court directed the plaintiffs to recover possession on payment of the requisite Court-fees. We agree with Mr. Dutta that if an amendment of the plaint had been asked for, it would have been more appropriate than the Court exercising suo motu jurisdiction. But we are not inclined to agree that the Court had no jurisdiction to do what has been done. Mr. Dutta was not in a position to indicate to us what prejudice has been caused to the defendants by not requiring the plaintiffs to make a formal application for amendment for addition of the relief of recovery of possession and in not giving an opportunity to the defendants to file a counter. In this view of the matter, we are not inclined to accept the contention of Mr. Dutta that the learned single Judge committed an error of jurisdiction in allowing the relief of recovery of possession".

This decision has no application to the facts of this case for the simple reason that therein it was found that no prejudice had been caused to defendants by not requiring the plaintiffs to make a formal application for amendment of the plaint. In the case in hand, it has been found that defendants Keshav Chandra and Jagdish Chandra as well as the tenants were in possession and that Keshav Chandra was in possession of part of the property in his own right and that Jagdish Chandra had no right or title to House No. 52. In order that a decree could be passed for possession in respect of the portion of the House No. 52 which was in possession of Jagdish Chandra, it is necessary to determine the portion of House No. 52 which was in possession of Jagdish Chandra as well as the portion in which Keshav Chandra was entitled to remain in possession. This could be done only after the plaint had been amended and, therefore, without an amendment of the plaint, a decree for possession could not be passed in respect of the portion of House No. 52 in possession of Jagdish Chandra. As a matter of fact suit No. 37/65 was filed for ejection of the defendants. No doubt that suit came to be consolidated along with the present suit. But once the bar under Section 42 of the Specific Relief Act became operative, in that the title itself was in jeopardy, no relief could be granted with reference to ejection. The High Court is right in this conclusion in this regard. Therefore, the consolidation does not improve the position of the plaintiff. It was held in Supreme General Films Exchange's case (1975 (2) SCC 530) at page 535 : (AIR 1975 SC 1810 at p. 1813) (supra) quoting the earlier ruling of this Court in Vemareddi Ramaraghava Reddy v. Konduru Seshu Reddy, 1966 Supp SCR 270 : (AIR 1967 SC 436) that Section 42 of the Specific Relief Act is not exhaustive and independent of that section a declaratory relief can be granted. It requires to be noted that in that case the suit was for declaration that the compromise decree was not binding on the deity. Hence, it fell outside Section 42 of the Act. Supreme General Exchange's case itself related to a lease. But we are confronted in the present situation with a declaration of title in relation

to immovable property which is specifically covered under Section 42 of the Specific Relief Act. So, this again does not lend any support to the appellant.

15. Merely because the plaint says in the prayer such other relief be granted to the plaintiff it does not mean that without a specific plea for possession and disregarding bar under Section 42 (proviso) of the Specific Relief Act, the suit could be decreed even with reference to the portions of which the plaintiff has been in possession. In the result, we find no merit in the appeal which stands dismissed. There will be no order as to costs. Appeal dismissed.

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