SUPREME COURT OF INDIA

Bachhaj Nahar

Vs.

Nilima Mandal

C.A.No.5798-5799 of 2008

(R.V.Raveendran and Lokeshwar Singh Panta,JJ.,)

23.09.2008

ORDER

R.V. Raveendran,J.,

SLP © Nos.23766-67 of 2005

1. Leave granted. Heard the learned counsel. For convenience, the parties will be referred to also by their ranks in the suit.

The facts

2. Respondents 1 and 2 (plaintiffs) filed a suit for declaration, possession and injunction (Title suit no.133/1982 on the file of Sadar Munsiff, Purnia) against the appellant (first defendant) and Sujash Kumar Ghosh (second defendant) in regard to the suit property. The suit property is a strip of land measuring East to West : 72 feet and North to South : 1'3" on the Western side and 10" On the Eastern side described in Schedule 'B' to the plaint. Plaintiffs claimed that the suit property was a part of the 'A' schedule property purchased by them under sale deed dated 29.12.1962. The reliefs sought in the said suit were:

> "(i) declarations that (a) the plaintiffs are the absolute owners in possession of the suit property; (b) the defendants do not have any right, title or interest or possession in respect of suit property; and (c) the first defendant had illegally encroached and started construction in the suit property;
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> (ii) a direction to first defendant to deliver possession of the suit property to plaintiffs after demolishing the construction over the same; and
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> (iii) a permanent injunction restraining first defendant from interfering with the suit property."

3. The first defendant resisted the suit contending that he had purchased the property to the South of plaintiff's property from second defendant under sale deed dated 5.5.1982 and the suit property actually formed part of his property. He contended that the plaintiffs had no right, title or interest in the suit property.

4. The trial court framed the following issues

> "(i) Is the suit as framed maintainable?
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> (ii) Have the plaintiffs got any cause of action to file the suit as against these defendants?
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> (iii) Is the suit barred by limitation and also on the principle of waiver estoppel and acquiescence?
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> (iv) Whether the description of the suit land is vague?
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> (v) Whether the suit land is part and parcel of land of the plaintiff purchased through registered kewala or the suit land in exclusive possession of Ishan Chand Ghosh, and after his death of second defendant, and after purchase of first defendant.
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> (vi) Has first defendant encroached any portion of the suit land?
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> (vii) Whether the plaintiffs got title over the suit land? Or were they using the suit land under express permission of the late Ishan Chand Ghosh and his son?
>
> (viii) To what relief or reliefs, plaintiffs are entitled?"

5. After considering the evidence, the trial court by judgment and decree dated 31.8.1987 decreed the suit in part. It held that the suit property was part of plaintiffs' property and that first defendant had encroached over a part of it to an extent of 15 sq. ft. The trial court held that as first defendant had already put up his construction over the encroached portion and was using it, instead of directing him to deliver back possession thereof, he should pay Rs.100/- as the price of the encroached portion, to the plaintiffs. Feeling aggrieved, the first defendant filed an appeal. Plaintiffs filed cross-objections. The first appellate court held that the plaintiffs had failed to prove that the suit property was part of their property purchased under sale deed dated 29.12.1962 or that first defendant had encroached upon any portion of plaintiffs' property; and that the evidence adduced by plaintiffs established that the Gali (suit property) was earlier owned by Ishan Chand Ghosh and his sons and plaintiffs were only using the said Gali with their express permission. The first appellate court therefore allowed the appeal filed by first defendant and dismissed the cross-objections filed by the plaintiffs by judgment dated 12.1.1989. As a consequence the suit of the plaintiffs was dismissed.

6. Feeling aggrieved, the plaintiffs filed a second appeal before the High Court. The High Court by judgment dated 14.5.2004 allowed the second appeal. The High Court held that the plaintiffs had failed to make out title to the suit property. It however held that plaintiffs had made out a case for grant of relief based on easementary right of passage, in respect of the suit property, as they had claimed in the plaint that they and their vendor had been using the suit property, and the first defendant and DW6 had admitted such user. The High Court was of the view that the case based on an easementary right could be considered even in the absence of any pleading or issue relating to an easementary right, as the evidence available was sufficient to make out easementary right over the suit property. The High Court therefore granted a permanent injunction restraining the first defendant from interfering with the plaintiffs' use and enjoyment of the 'right of passage' over the suit property (as also of the persons living on the northern side of the suit property). The High Court also observed that if there was any encroachment over the said passage by the first defendant, that will have to be got removed by the "process of law". The High Court also issued a permanent injunction restraining the plaintiffs from encroaching upon the suit property (passage) till the plaintiffs got a declaration of their title over the suit property by a competent court. The first defendant sought review of the said judgment. The review petition was dismissed by the High Court by order dated 9.12.2004.

7. The said judgment and order on review application, of the High Court, are challenged by the first defendant in these appeals by special leave. The Appellant contends that neither in law, nor on facts, the High Court could have granted the aforesaid reliefs.

8. The High Court, in this case, in its obvious zeal to cut delay and hardship that may ensue by relegating the plaintiffs to one more round of litigation, has rendered a judgment which violates several fundamental rules of civil procedure. The rules breached are:

> "(i) No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject matter of an issue, cannot be decided by the court.
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> (ii) A Court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.
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> (iii) A factual issue cannot be raised or considered for the first time in a second appeal.
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> Civil Procedure Code is an elaborate codification of the principles of natural justice to be applied to civil litigation. The provisions are so elaborate that many a time, fulfillment of the procedural requirements of the Code may itself contribute to delay. But any anxiety to cut the delay or further litigation, should not be a ground to float the settled fundamental rules of civil procedure. Be that as it may. We will briefly set out the reasons for the aforesaid conclusions."

9. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take.

10. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. As a result the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the court cannot, on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a court is not whether there is some material on the basis of which some relief can be granted. The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the court could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief.

11. The High Court has ignored the aforesaid principles relating to the object and necessity of pleadings. Even though right of easement was not pleaded or claimed by the plaintiffs, and even though parties were at issue only in regard to title and possession, it made out for the first time in second appeal, a case of easement and granted relief based on an easementary right. For this purpose, it relied upon the following observations of this Court in *Nedunuri Kameswaramma v. Sampati Subba Rao*[1]*:*

> "No doubt, no issue was framed, and the one, which was framed, could have been more elaborate, but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mistrial which vitiates proceedings. We are, therefore, of opinion that the suit could not be dismissed on this narrow ground, and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion."

But the said observations were made in the context of absence of an issue, and not absence of pleadings. The relevant principle relating to circumstances in which the deficiency in, or

absence of, pleadings could be ignored, was stated by a Constitution Bench of this Court in *Bhagwati Prasad vs. Shri Chandramaul* [2]*:*

> "If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matter relating to the title of both parties to the suit was touched, tough indirectly or even obscurely in the issues, and evidence has been led about them then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is : did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another
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> (emphasis supplied)

The principle was reiterated by this Court in *Ram Sarup Gupta (dead) by LRs., vs. Bishun Narain Inter College*[3] *:*

> "It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the court to ascertain the substance if the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of pleadings, instead the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings, parties knew the case and they proceeded to trial on those issue by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal."

[emphasis supplied]

12. It is thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. The principles laid down in Bhagwati Prasad and Ram Sarup Gupta (supra) referred to above and several other decisions of this Court following the same cannot be construed as diluting the well settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. Another aspect to be noticed, is that the court can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case. Where neither party puts forth such a contention, the court cannot obviously make out such a case not pleaded, suo moto.

13. A perusal of the plaint clearly shows that entire case of the plaintiffs was that they were the owners of the suit property and that the first defendant had encroached upon it. The plaintiffs had not pleaded, even as an alternative case, that they were entitled to an easementary right of passage over the schedule property. The facts to be pleaded and proved for establishing title are different from the facts that are to be pleaded and proved for making out an easementary right. A suit for declaration of title and possession relates to the existence and establishment of natural rights which inhere in a person by virtue of his ownership of a property. On the other hand, a suit for enforcement of an easementary right, relates to a right possessed by a dominant owner/occupier over a property not his own, having the effect of restricting the natural rights of the owner/occupier of such property.

14. Easements may relate to a right of way, a right to light and air, right to draw water, right to support, right to have overhanging eaves, right of drainage, right to a water course etc. Easements can be acquired by different ways and are of different kinds, that is, easement by grant, easement of necessity, easement by prescription, etc. A dominant owner seeking any declaratory or injunctive relief relating to an easementary right shall have plead and prove the nature of easement, manner of acquisition of the easementary right, and the manner of disturbance or obstruction to the easementary right. The pleadings necessary to establish an easement by prescription, are different from the pleadings and proof necessary for easement of necessity or easement by grant. In regard to an easement by prescription, the plaintiff is required to plead and prove that he was in peaceful, open and uninterrupted enjoyment of the right for a period of twenty years (ending within two years next before the institution of the suit). He should also plead and prove that the right claimed was enjoyed independent of any

agreement with the owner of the property over which the right is claimed, as any user with the express permission of the owner will be a licence and not an easement. For claiming an easement of necessity, the plaintiff has to plead that his dominant tenement and defendant's servient tenement originally constituted a single tenement and the ownership thereof vested in the same person and that there has been a Severance of such ownership and that without the easementary right claimed, the dominant tenement cannot be used. We may also note that the pleadings necessary for establishing a right of passage is different from a right of drainage or right to support of a roof or right to water course. We have referred to these aspects only to show that a court cannot assume or infer a case of easementary right, by referring to a stray sentence here and a stray sentence there in the pleading or evidence.

15. A right of easement can be declared only when the servient owner is a party to the suit. But nowhere in the plaint, the plaintiffs allege, and nowhere in the judgment, the High Court holds, that the first or second defendant is the owner of the suit property. While concluding that the plaintiffs were not the owners of the suit property, the High Court has held that they have a better right as compared to the first defendant and has also reserved liberty to the plaintiffs to get their title established in a competent court. This means that the court did not recognize the first defendant as the owner of the suit property. If the High Court was of the view that defendants were not the owners of the suit property, it could not have granted declaration of easementary right as no such relief could be granted unless the servient owner is impleaded as a defendant. It is also ununderstandable as to how while declaring that plaintiffs have only an easementary right over the suit property, the court can reserve a right to the plaintiffs to establish their title thereto by a separate suit, when deciding a second appeal arising from a suit by the plaintiffs for declaration of title. Nor is it understandable how the High Court could hold that the apart from plaintiffs, other persons living adjacent to and north of the suit property were entitled to use the same as passage, when they are not parties, and when they have not sought such a relief.

16. The observation of the High Court that when a plaintiff sets forth the facts and makes a prayer for a particular relief in the suit, he is merely suggesting what the relief should be, and that it is for the court, as a matter of law, to decide upon the relief that should be granted, is not sound. Such an observation may be appropriate with reference to a writ proceeding. It may even be appropriate in a civil suit while proposing to grant as relief, a lesser or smaller version of what is claimed. But the said observation is misconceived if it is meant to hold that a civil court may grant any relief it deems fit, ignoring the prayer. It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings. That apart, in civil suits, grant of relief is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds barring relief, like res judicata, estoppel, acquiescence, non-joinder of causes of action or parties etc., which require pleading and proof. Therefore, it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the court can on examination of facts grant any relief as it thinks fit. In a suit for recovery of Rs.one lakh, the court cannot grant a decree for Rs. Ten lakhs. In a suit for recovery possession of property 'A', court cannot grant possession of property 'B'. In a suit praying for permanent injunction, court grant a relief of declaration or possession. The

jurisdiction to grant relief in a civil suit necessarily depends on the pleadings, prayer, court fee paid, evidence let in, etc.

17. In the absence of a claim by plaintiffs based on an easementary right, the first defendant did not have an opportunity to demonstrate that the plaintiffs had no easementary right. In the absence of pleadings and an opportunity to the first defendant to deny such claim, the High Court could not have converted a suit for title into a suit for enforcement of an easementary right. The first appellate court had recorded a finding of fact that plaintiffs had not made out title. The High Court in second appeal did not disturb the said finding. As no question of law arose for consideration, the High Court ought to have dismissed the second appeal. Even if the High Court felt that a case for easement was made out, at best liberty could have been reserved to the plaintiffs to file a separate suit for easement. But the High court could not, in a second appeal, while rejecting the plea of the plaintiffs that they were owners of the suit property, grant the relief of injunction in regard to an easementary right by assuming that they had an easementary right to use the schedule property as a passage.

18. We accordingly allow these appeals and set aside the judgment and order of the High Court and restore the judgment of the first appellate court. Parties to bear respective costs.

19. The learned counsel for respondents - plaintiffs submitted that the parties have been litigating for more than quarter of a century over a small strip; and that without prejudice to their rights, if some arrangement could be arrived at whereby the plaintiffs are permitted to have at least a 'pakka nala' for passage of effluents from their property, it may put an end to the dispute between the two neighbours. All that we can observe is that it is always open to the parties to get any issue or dispute settled by mediation or by direct negotiations. This observation should not however be construed as recognition of any right in plaintiffs.

Judgment Referred:

[1]*AIR 1963 SC 0884*
[2]*AIR 1966 SC 0735*
[3]*AIR 1987 SC 1242*