SUPREME COURT OF INDIA

Md. Nooman

Vs.

Md. Jabed Alam

C.A.No.2579 of 2004

(Aftab Alam and R.M. Lodha JJ.)

22.09.2010

JUDGEMENT

Aftab Alam, J.

1. A finding on the question of title recorded in a suit for eviction would how far be binding in a subsequent suit for declaration of title and recovery of possession between the same parties? This is the question that arises for consideration in this appeal. The answer to the question would depend on, in what manner the question of title was raised by the parties and how it was dealt with by the court in the eviction proceedings. Ordinarily, it is true, in a suit for eviction even if the court goes into the question of title, it examines the issue in an ancillary manner and in such cases (which constitute a very large majority) any observation or finding on the question of title would certainly not be binding in any subsequent suit on the dispute of title. But there may be exceptions to the general rule and as we shall find presently, the case in hand seems to fall in that exceptional category of very limited number of cases.

2. Amina Khatoon, the mother of respondent nos.1-4, (who were substituted in her place and brought on record after her death) instituted a suit for eviction (Title Suit No.36 of 1973) in the Court of Second Munsif, Arrah, against Md. Lukman, the father of appellant nos.1-6 (who were similarly substituted in his place and brought on record after his death).

> "According to the plaintiff Amina Khatoon, the suit property originally belonged to her mother-in-law, Sulakshana. Sulakshana had two other sons, Md. Lukman (the original defendant) and Md. Jan, apart from Amina's husband, Mahmood Hassan. Amina further claimed that Sulakshana sold the suit house to her through a registered sale deed dated August 13, 1957.
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> Following the purchase of the suit house, she moved the Block Development Officer (BDO) and the municipality for mutation of her name in respect of the suit house in the revenue and municipal records. The defendant Md. Lukman, filed an objection

before the BDO, but his objection was disallowed and her name was entered in the revenue and municipal records.

Later on, the municipality filed a suit against her for arrears of tax whereupon all the outstanding dues of tax were paid by her. It was further the case of Amina, that she had let out the suit house to the defendant about 4 or 5 years prior to the filing of the suit on a monthly rent of Rs.10.00 (rupees ten only). The defendant did not pay the rent from September, 1971 to February 13, 1973. She then sent a registered notice to him under section 106 of the Transfer of Property Act, 1882 through her lawyer determining the defendant's tenancy and asking him to vacate the house by March 31, 1973. The defendant did not vacate the house forcing her to go to the court."

3. The defendant in his written statement, apart from the formal objections to the maintainability of the suit, denied that Sulakshana executed any sale deed with respect to the suit house in favour of the plaintiff. He described the sale deed, relied upon by the plaintiff as the basis of her title, as a forged and fabricated document. In this connection, the defendant stated that Sulakshana had an attack of paralysis before August 13, 1957 when the sale was said to have been executed by her. She had lost her senses and she was not in a position to execute any sale deed. No consideration was paid by the plaintiff to Sulakshana and the title to the house never passed to her. The defendant set up a rival claim of title over the suit house. He stated that Sulakshana had transferred the suit house in his favour in 1950, by Hiba (oral gift) and since then he was coming in possession of the suit property.

"Originally, it was parti (vacant) land. He submitted a plan in the municipality for construction of the house on it and constructed the house after the plan was sanctioned. He was living in the house constructed by him over the land which was given to him by his mother by Hiba. He denied any relationship of landlord and tenant with the plaintiff and also denied to have taken the suit house from the plaintiff on a monthly rent of Rs.10.00 (rupees ten only). He never paid any rent to the plaintiff, nor was any rent due against him."

4. On the basis of the pleadings of the parties, the trial court framed seven issues, of which issue nos.3 & 4 relating to the plaintiff's claim of title over the suit property and issue no.5 about the relationship of landlord and tenant between the parties are relevant for this appeal. Those three issues are as under:

"3. Has the plaintiff got title to the suit land?

4. Is the sale deed genuine, valid and for consideration?

5. Is there any relationship of landlord and tenant between the Parties?"

5. In support of the rival claims of title over the suit property, both the plaintiff and the defendant led their respective evidences, both oral and documentary. The defendant also

examined the third brother, Md. Jan from his side as DW11. On a consideration of the evidences adduced before it, the trial court upheld the plaintiff's claim of title to the property arriving at the following finding:

> "In view of the discussion made above I hold that the sale deed (Ext.4) is genuine and that story set up by the defendant that an oral hiba was made by Sulachna to him has not been proved.
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> The plaintiff has got Title to the suit land and the sale deed is genuine valid and for consideration."

6. It then took up issue nos.5 and 6 (about the plaintiff's entitlement to a decree of eviction) together and came to hold and find that the relationship of landlord and tenant between the parties had not been proved. In light of its finding on issue no.5, the court further observed that in case the question of title is raised by the defendant and if it is found that there is no contract of tenancy, the proper course would be to dismiss the suit and not to convert it into a declaratory or possessory suit which is of altogether a different nature.

> "The court further pointed out that the suit before it was neither for declaration of title nor the plaintiff had paid ad valorem court fee. The plaintiff was, therefore, not entitled to a decree of eviction since the relationship of landlord and tenant was not established between the parties. It, accordingly, dismissed the suit by judgment and order dated December 23, 1974."

7. The plaintiff took the matter in appeal, (Title Appeal No.12 of 1975) which too was dismissed by the Second Additional District Judge, Arrah, by judgment and order dated February 19, 1975. From the judgment of the first appellate court, it appears that before it the main focus was on the issue of relationship of landlord and tenant between the parties. The trial court found that the suit property was vacant land and not a house (the case of the plaintiff was that the suit property was a piece of land 3 kathas and 5 dhurs in area with a fallen down house). It also noted that on behalf of the respondent no argument was advanced on the invalidity of the sale deed and the controversy was mainly about the relationship of landlord and tenant between the parties. On this issue, the appellate court came to the same finding as the trial court and dismissed the plaintiff's appeal observing as follows:

> "10. It is quite clear from the above enunciated principle that in order to get a decree in such a suit the plaintiff must not come to the Court with a false story. In the present case, it is quite obvious the plaintiff has come with a false case that she let out a house on the suit land to the deft (sic defendant) on a rent of Rs.10/- per month. If there is no relationship of landlord and tenant between the parties the plaintiff should have prayed for declaration her title and recovery of possession after paying advalorem Court fee on the current market value of the suit property. By filing a suit for eviction of the defendant and paying small Court fee on twelve month alleged rent of the

house, the plaintiff has adopted a tricky way of getting her title declared and possession of the suit house recovered after paying very low amount of the court fee."

8. The plaintiff did not take the matter any further but filed another suit (Title Suit No.16/82 of 1978-79) against Md. Lukman seeking declaration of title over the property and recovery of its possession from the defendant. In this suit, her claim of title over the suit property was exactly the same as in the previous suit. The defendant too, apart from raising the objections based on limitation and res judicata and similar other formal pleas mainly stuck to the same story as in the previous case. According to the defendant, the sale deed relied upon by the plaintiff was not a genuine document for consideration and it was not executed by Sulakshana, who was the mother of the defendant. It was stated on behalf of the defendant that Sulakshana died in 1957. In the beginning of that year she suffered from fever for about a month and remained confined to bed and thereafter she suffered an attack of paralysis. She lost all power of understanding and continued in that state till her death in August 1957. The defendant specifically pleaded that on August 13, 1957 when the disputed sale deed was shown to have been executed, she had no power of understanding. It was further stated on his behalf that the plaintiff's husband was a clever litigant and he manoeuvred to fabricate the sale deed by setting up some other woman as Sulakshana. It was also stated that if there was in existence any sale deed purportedly executed by Sulakshana, it must have been manufactured in collusion with the scribe, the attesting witnesses and the registrar and it would not confer any right, title or interest in the suit property on the plaintiff. It was further the case of the defendant that the disputed sale deed was never acted upon and the plaintiff never came in actual possession of the suit property on this basis. The defendant also denied the case of the plaintiff that she had inducted him as a tenant in the suit premises on a monthly rental of Rs.10.00 (rupees ten only) or as a licensee, as totally false and concocted. The defendant claimed that his mother Sulakshana had given him the suit property in the year 1950 by Hiba (oral gift) and put him in actual physical possession of the suit premises and since then he was coming in its possession. He constructed a boundary wall around the land and a house consisting of five rooms, etc. It was lastly claimed that the defendant was coming and continuing in possession to the knowledge of everyone, including the plaintiff and, thus, the defendant had, in any event, acquired title by adverse possession.

9. It is, thus, to be seen that in the second suit too both parties went to the court with the same stories as in the previous suit, though, it is true that this time each side led some additional evidence in support of its case, for example, the plaintiff relied upon and produced a copy of the judgment in the earlier suit in which her claim of title over the suit property was upheld.

10. The trial court framed a number of issues, of which issue nos. III, IV, V & VI are relevant for this appeal and are as follows:

"III) Has the plaintiff got title over the suit property? IV) Is there any relationship of landlord and tenant between the plaintiff and the defendant? V) Has the plaintiff acquired title by adverse possession? VI) Is the plaintiff entitled to recovery of possession? "

> The trial court considered issue nos. III, IV & V together and came to find and hold that the plaintiff had succeeded in proving her title whereas the defendant had failed to prove his adverse possession. Issue nos. III & V were therefore decided in the plaintiff's favour while issue no. IV was decided against her. On the basis of its findings, the trial court held that the plaintiff had valid cause of action and it, accordingly, decreed the suit by judgment and order dated February 28, 1981."

11. Against the judgment and order passed by the trial court the defendant preferred an appeal (Title Appeal No.33 of 1981). The first appellate court (the eighth Additional District Judge, Arrah), on a reappraisal of the evidence produced by the parties, came to find and hold that the plaintiff had failed to prove that Sulakshana had put her left thumb impression on the sale deed (Ext.3) after understanding its contents and she had, thus, failed to prove her title to the suit premises on the basis of the sale deed. The appellate court, accordingly, allowed the appeal and by judgment and order dated May 21, 1987 set aside the judgment and decree passed by the trial court and dismissed the plaintiff's suit.

12. The original plaintiff was dead by this time and her heirs and legal representatives, the present respondents, took the matter in second appeal (Appeal from Appellate Decree No.236 of 1987) to the High Court. In the High Court, the second appeal was heard on the substantial question of law framed as under:

> "...whether the judgment and decree regarding title passed in Title Suit No.36 of 1973 (Ext.15) shall operate as res judicata between the parties on the question of title."

13. The High Court by judgment and order dated May 24, 2002 answered the question in the affirmative, in favour of the appellants (respondents herein), allowed the appeal, set aside the judgment and order passed by the appeal court below and restored the judgment and decree of the trial court.

> "The High Court noted that the earlier suit (for eviction) and the later suit for declaration of title and recovery of possession were between the same parties and were contested on exactly the same claims raised by the two sides. The plaintiff on each occasion was claiming title to the suit premises on the basis of a sale deed executed by Sulakshana in her favour in the year 1950. The defendant on each occasion alleged that the sale deed was sham, fake and fabricated and set up a rival claim of title on the plea that his mother Sulakshana had made an oral gift of the suit premises in his favour in the year 1950 and since then he was coming in possession over it. The premises, when it was given to him in gift, was a vacant land over which he had constructed a house after obtaining sanction from the municipality. The High Court, therefore, observed as under:

"9... The facts of the earlier Title Suit No.36 of 1973, which was between the same parties and present Title Suit No.16 of 1978 also between the same parties, show that the plea taken by both the parties regarding title in both the Title Suits are same.

10. In the facts and circumstances of the case, the judgment and decree regarding title passed in Title Suit No.36 of 1973 (Ext.15) shall operate as res judicata between the parties on the question of title."

14. Mr. H.L. Agrawal, learned senior advocate, appearing for the appellant contended that the High Court had seriously erred in holding that the finding in the earlier suit of eviction would operate as res judicata in the subsequent suit for declaration of title and recovery of possession. Mr. Agrawal contended that a court dealing with an eviction suit was a creature of the Rent Act and was a court of limited jurisdiction. It had no authority or jurisdiction to decide disputes of title and hence, any finding recorded by it on the larger issue of title could not be binding on a court under the Code of Civil Procedure adjudicating upon a dispute of title between the two sides.

"He further submitted that there may be instances where in a suit for eviction the tenant might deny the title of the person seeking his ejectment and in those cases the rent court may incidentally go into the question of title in order to decide on the primary issue of eviction. But its findings on the issue of title would only be incidental and never binding in a proper suit for declaration of title and recovery of possession. In support of the submission he relied upon a decision of this Court in *Shamim Akhtar v. Iqbal Ahmad & Anr.*[1], in which it is said that in an eviction suit under the Rent Act, the question of title can be considered by the court as an incidental question and the final determination of title must be left to the decision of the competent court. The decision in Shamim Akhtar arose from U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 and the Provincial Small Cause Courts Act, 1887 and it was on a totally different set of facts. The observation of the court relied upon by Mr. Agrawal was of course stating the general rule and no more than that. The decision in Shamim Akhtar in no way helps the case of the appellants in the present appeal."

15. The counsel for the respondents on the other hand relied upon a decision of this court in *Sajjadanashin Sayed Md. B.E.Edr.by LRs. (D) vs. Musa Dadabhai Ummer and Ors.*[2]. The decision in this case dealt with the question when a matter can be said to be directly and substantially in issue and when it is only collaterally and incidentally in issue. The decision in Sajjadanashin does seem to help the case of the respondents. But we may state here that Mr. Agrawal with great fairness brought to our notice a decision of the Patna High Court in *Pardip Singh vs. Ram Sundar Singh*[3], though it is clearly against him. It is an old decision in which the division bench of the High Court placed reliance on two earlier decisions of the Privy Council. In Pardip Singh Meredith J., speaking for the division bench of the court observed as follows:

> "1 To which both, Mr. Agrawal and the two of us have been very closely associated at some time.
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> "The decision in a rent suit is not res judicata on the question of title unless the question of title had to be decided, was expressly raised, and was expressly decided between the parties and in each case it is necessary to examine carefully the decision in the rent suit before any opinion can be formed as to whether it operates as res judicata on the question of title or not.
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> Ordinarily the decision would be res judicata only with regard to the existence of the relationship of landlord and tenant. The difference in the two classes of cases is very well illustrated in two Privy Council decisions, namely, *Run Bahadoor Singh v. Mt. Lucho Koer*[4], where it was held that the decision was not res judicata as the question of title had been gone into only incidentally and collaterally, and Radhamadhub *Holdar v. Manohar Mookerji*[5], where the question of title was directly decided in a rent suit, and the decision was held to be res judicata."

16. We respectfully concur with the view expressed in the decision in Pardip Singh.

17. We have carefully examined the pleadings of the parties in the two suits and the evidences led by them in support of their respective claims regarding title in the two suits. And, we are satisfied that the issue of title was expressly raised by the parties in the earlier eviction suit and it was expressly decided by the eviction court. The question of title was directly and substantially in issue between the parties in the earlier suit for eviction.

> Hence, the High Court was right in holding that the finding recorded in favour of the plaintiff in the earlier suit for eviction would operate as res judicata in the subsequent suit for declaration of title and recovery of possession between the parties.

18. We, thus, find no merit in the appeal. It is dismissed, but in the facts and circumstances of the case there will be no order as to costs.

[1]*(2000) 8 SCC 123*
[2]*(2000) 3 SCC 350*
[3]*AIR (36) 1949 Patna 510*
[4]*12 I.A. 23: (11 Cal. 301 P.C.)*
[5]*15 I.A. 97: (15 Cal. 756 P.C.)*