

SUPREME COURT OF INDIA

Hari Ram

Vs.

Jyoti Prasad

C.A.No.1042 of 2011

(Dr.Mukundakam Sharma and Anil R.Dave,JJ.,)

27.01.2011

JUDGMENT

Dr.Mukundakam Sharma,J.,

1. Leave granted.

2. By this judgment and order, we propose to dispose of the aforesaid appeal which is filed by the appellant herein after being aggrieved by the judgment and order passed by the High Court in RSA No. 2698 of 2008 affirming the judgment and decree passed by the trial Court in Civil Suit No. 160 of 2003 which was affirmed by the First Appellate Court in Civil Appeal No. 92 of 2007. These facts, therefore, make it crystal clear that the present appeal is directed against the concurrent findings of fact of the High Court, the first Appellate Court i.e. the judgment of the Additional District Judge and the trial court which was the Court of Civil Judge (Junior Division).

3. In order to appreciate the contentions raised before us by the learned counsel appearing for the appellant, it would be necessary to set out certain basic facts leading to filing of the present appeal.

4. The suit was filed by the respondent herein contending inter alia that all the six persons including respondent No. 1 have their common interest in the disputed street alongwith co-inhabitants of the same area. It was stated that the residential houses of the respondents are falling in the site plan which indicates that there is a common street for ingress and egress of the general public. It was alleged in the plaint that earlier Bal Kishan Dass who was examined as PW-4 was the original owner of the entire area out of which he curved out a colony selling plots in favour of various parties. It was also stated in the plaint that at that time itself a 10 feet wide public street was left on the ground as detailed in the site plan for the common use of all the plot holders of the colony, but further allegation was that the appellant/defendant from the time of possession of his plot had evil eye on the aforesaid disputed street and the defendant No. 1 and he namely defendant No. 2 encroached upon substantial part of the same making the street narrowed down causing inconvenience to the

users of the said street. Incidentally the suit was filed invoking Order I Rule 8 of Code of Civil Procedure [called in short 'C.P.C.].

5. In the plaint it was further stated that earlier the respondent No. 1 as complainant filed a complaint under Section 133 of the Code of Criminal Procedure, 1973 (for short "the Cr.P.C.") which was decided in favour of the plaintiff/respondent No. 1 and the said judgment was passed by the SDM.

6. When the matter was challenged before the Punjab and Haryana High Court, the High Court held that the matter which is agitated relates to disputed facts and therefore requires evidence and that the dispute between the parties could only be effectively decided if a civil suit is filed. As the High Court had held that the dispute between the parties would be decided by filing a civil suit, consequently the aforesaid plaint was filed in the Court of Civil Judge (Junior Division) which was registered as Civil Suit No. 160 of 2003.

7. Defendant Nos. 1 and the present appellant as defendant No. 2 filed a combined written statement raising objections regarding the maintainability of the suit and also with regard to the merit of the contentions raised in the plaint. On the basis of the pleadings of the parties, four issues were framed by the trial court to the following effect:

“1. Whether the defendants have made illegal / unauthorized construction over the public street by way of illegal encroachment as shown in red colour in the attached site plan shown by letters ABCD situated at village Matlauda, Distt. Panipat ?
OPP.2. In case issue No. 1 is decided in favour of plaintiff, then whether plaintiff is also entitled to injunction, as prayed for? OPP.3. Whether suit filed by the plaintiff is not maintainable in the present form? OPD. 4. Relief.”

8. To substantiate his case, the plaintiff/respondent No. 1 examined 8 witnesses and produced some documents whereas the present appellant as defendant No. 2 examined himself as DW-1 as a sole witness. After recording the evidence adduced by the parties the learned Civil Judge (Junior Division) heard the parties and thereafter by a judgment and decree dated 6.12.2007 decreed the suit and a permanent injunction was issued directing the removal of unauthorized construction from the ground as shown in the site plan. Since, the defendant No. 1 had already removed his portion of illegal construction, the present appellant was given one month's time to remove all such constructions failing which respondent No. 1 was given their legal right to get the said construction removed on his own expenses which was allowed to be recovered from the defendants. The defendants were further restrained from raising any further construction in future on the aforesaid 10 feet Rasta as detailed in PW - 7A.

9. Being aggrieved by the aforesaid judgment and order passed by the trial court, an appeal was filed before the Additional District Judge, Panipat whereas the appeal was registered as Civil Appeal No. 92 of 2007. The aforesaid appeal was heard by the Additional District Judge who by his judgment and decree dated 25.7.2008 dismissed the appeal filed by the

appellant. Thereafter, the appellant filed a second appeal before the Punjab and Haryana High Court which was registered as RSA No. 2698 of 2008.

10. By a judgment and decree dated 31.7.2009, the aforesaid appeal was also dismissed by the High Court holding that there is no specific question of law involved in the aforesaid appeal.

11. Being still aggrieved, the present appeal was filed by the appellant herein in which notice was issued and on service thereof, we heard the learned counsel appearing for the parties.

12. Mr. Anoop G. Choudhary, learned Senior Counsel appearing for the appellant very forcefully argued that none of the judgments and decrees passed by the courts below is justified. He submitted that the suit itself was barred by limitation but despite the said fact and despite the fact that a specific stand was taken in the written statement contending that the suit is barred by limitation, no such issue was framed by the trial Court and no decision was rendered by the trial court as also by the appellate Court on the said issue and that the High Court was not justified in dismissing the plea raised by the appellant on the ground that the cause of action is a continuing cause of action and, therefore, it cannot be said that the suit is barred by limitation. His second contention was that there could and should have been no finding regarding the encroachment made by the appellant in absence of production of any official document to indicate that there was in fact a public street used by the residents of the area. He submitted that no evidence has been led to prove and establish that it was a public street on which encroachment was made by the appellant. His last submission was that the suit was said to be in representative capacity as shown in the plaint but the formalities for instituting a case i.e. representative suit was not followed and therefore the suit should have been dismissed at the very threshold itself.

13. The aforesaid submissions of the learned senior counsel appearing for the appellant were refuted by the learned counsel appearing for the respondents who placed before us the findings recorded by the three courts below and relying on the same, it was submitted that the present appeal has no merit at all.

14. In the light of the aforesaid submissions of the counsel appearing for the parties, we also perused the records very carefully. We would first deal with the plea of limitation as raised before us by the appellant.

15. The records placed before us do disclose that the appellant in his written statement took up a plea that the suit is barred by limitation. However, despite the said fact no issue was framed nor any grievance was made by the appellant for non-framing of an issue of limitation.

16. On going through the records, we do not find that the appellant has made any submission before the trial court as also before the first appellate court regarding the plea of limitation. Such a plea is seen to have been made before the High Court. The said plea which was made before the High Court was considered at length by the High Court and the High Court held

that although such a plea was not raised either before the trial court or before the appellate court, the same could be raised before the High Court in view of the provisions of Section 3 of the Limitation Act which places an obligation upon the Court to discuss and consider such a plea despite the fact that no such plea was raised and argued before the Trial Court as also before the First Appellate Court.

17. The High Court after considering the aforesaid plea held that the suit cannot be said to be barred by limitation as an encroachment on a public street is a continuing wrong and therefore, there exists a continuing cause of action. The records disclose that initially a complaint under Section 133 of Cr.PC was filed which was pursued with all sincerity upto the High Court. But the High Court held that the dispute between the parties could be better resolved if a proper civil suit is filed and when evidence is led with regard to the disputed questions of fact. We find from the records that immediately thereafter the aforesaid suit was filed seeking issuance of a mandatory injunction. In view of the aforesaid facts and also in view of the fact that encroachment on a public street by any person is a continuing cause of action, we find no merit in the said contention.

18. Any act of encroachment is a wrong committed by the doer. Such an encroachment when made to a public property like encroachment to public road would be a graver wrong, as such wrong prejudicially affects a number of people and therefore is a public wrong. So long any obstruction or obstacle is created to free and unhindered access and movement in the road, the wrongful act continues thereby preventing the persons to use the public road freely and unhindered. Therefore, that being a continuing source of wrong and injury, cause of action is created as long as such injury continues and as long as the doer is responsible for causing such injury.

19. At this stage it would be apposite to refer to and rely upon Section 22 of the Limitation Act, 1963, which reads as follows: "In case of a continuing breach of contract or in case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues." This court had the occasion to deal with Section 22 of the Limitation Act, 1963, in the case of Sankar Dastidar v. Shrimati Banjula Dastidar and Am- reported in AIR 2007 SC 514, in which the Supreme Court held that when a right of way is claimed whether public or private over a certain land over which the tort-feaser has no right of possession, the breaches would be continuing, to which the provisions of Section 22 of the Limitation Act, 1963, would apply. Therefore, in our considered opinion the plea that the suit is barred by limitation has no merit at all.

20. The next plea which was raised and argued vehemently by the learned senior counsel appearing for the appellant was that the suit was bad for non-compliance of the provisions of Order I Rule 8 of the CPC. The said submission is also found to be without any merit as apart from being a representative suit, the suit was filed by an aggrieved person whose right to use public street of 10 feet width was prejudicially affected. Since affected person himself has filed a suit, therefore, the suit cannot be dismissed on the ground of alleged non-compliance of the provisions of Order I Rule 8 of the CPC.

21. In this connection, we may appropriately refer to a judgment of the Supreme in Kalyan Singh, London Trained Cutter, Johri Bazar, Jaipur Vs. Smt. Chhoti and Ors. reported in AIR 1990 SC 396. In paragraph 13 of the said judgment, this Court has held that suit could be instituted by representative of a particular community but that by itself was not sufficient to constitute the suit as representative suit inasmuch as for a representative suit, the permission of Court under Order I Rule 8 of the CPC is mandatory.

22. In paragraph 14 of the said judgment, it was also held that any member of a community may successfully bring a suit to assert his right in the community property or for protecting such property by seeking removal of encroachment therefrom and that in such a suit he need not comply with the requirements of Order I Rule 8 CPC. It was further held in the said case that the suit against alleged trespass even if it was not a representative suit on behalf of the community could be a suit of this category.

23. In that view of the matter and in the light of the aforesaid legal position laid down by this Court, we hold that the suit filed by the plaintiff/respondent No. 1 was maintainable.

24. According to the appellant no official document was placed and no official witness was examined to prove and establish that the suit land was a public street in which encroachment is made by the appellant. At this stage it would be appropriate to mention that the suit was initially instituted against two defendants namely defendant No. 1 and defendant No. 2. The appellant herein was defendant No. 2 in the said suit. So far as defendant No. 1 is concerned, the records disclose that the Panchayat of the area took a decision that both of them have encroached upon a public property and the street and therefore they should remove the encroachment. It is disclosed from the records that pursuant to the aforesaid decision of the Panchayat, the defendant No. 1 removed his encroachment after 17 admitting that he had also encroached upon some area of the 10 feet wide street which fact he admitted before the panchayat and later on he removed the said encroachment. The aforesaid fact is established from the statements of PW-1. Jyoti Parshad, PW-5 - Sadhu Ram and PW-6 - Ram Pal who were present and participated in the said Panchayat also corroborated the said admission before the Panchayat.

25. Besides, in all 8 witnesses were examined by the plaintiff respondent No. 1. PW-3, Dharam Singh Patwari who was examined in the suit proved the report of the BDO who had visited the disputed property on 18.1.1995 after which he also submitted a report certifying that an encroachment has been made by the appellant over the disputed street. Bal Kishan Dass who was also examined as PW-4 had specifically stated in his evidence that he had carved out a colony in the year 1981-82 and he had sold the plots to the plaintiff as well as defendants and other inhabitants of the village and towards eastern side of the plot of the defendant/appellant he had left a street of 10 feet width.

26. As against the aforesaid evidence adduced on behalf of the plaintiff/respondent No. 1, the appellant examined himself as DW-1 wherein he only took a stand that disputed property is not a part of the street and that after purchasing the plot he had constructed the house and

despite the said fact no objection was taken and therefore it cannot be said that he had constructed a house also on a part of the said disputed suit property.

27. On appreciation of the aforesaid evidence, all the three courts namely the High Court, the First Appellate Court as also the trial court held that the aforesaid disputed suit land is a part of the public street where the appellant has encroached upon by constructing a part of the house. The aforesaid findings are therefore findings of fact. Public Officer namely Patwari was examined who had proved the report submitted by the BDO stating that part of the suit property is a public street.

28. Ext. PW-7A filed by the plaintiff/respondent is a site plan which proves and establishes that there is a public street of 10 feet width. In all the sale deeds of the area as disclosed from the statement of PW-4 Bal Kishan Dass, the aforesaid street of 10 feet width is shown and the aforesaid evidence go unrebutted. Thus there exists a street of 10 feet width. It is also proved from the evidence on record that the appellant has encroached upon the suit property consisting of the aforesaid street of 10 feet width. That being the position, we find no infirmity in the judgment and decree passed by the Trial Court and affirmed by the First Appellate Court and by the High Court in the Second Appeal.

29. We, therefore, find no merit in this appeal which is dismissed with costs, which is assessed by us at Rs. 10,000/-. The decree passed by the trial court is confirmed. If the appellant fails to vacate and remove the unauthorized encroachment within a period of 60 days from today, it will be open for the plaintiff/respondent No. 1 to get the decree executed in accordance with law.

30. In terms of the aforesaid observations and directions, the appeal is dismissed.