

RAJASTHAN HIGH COURT

Raj Mal

Vs.

PremNarain

Civil Regular First Appeal No. 135 and 144 of 1997

(A.C. Goyal, J.)

19.03.2004

JUDGEMENT

A. C. Goyal, J.

1. Both the appeals (Appeal No. 135/1997 by the plaintiff and Appeal No. 144/1997 by the defendants) have been preferred against the judgment and decree dated 11-2-1997 whereby learned Additional District Judge, Baran partly decreed the plaintiff's suit for mesne profits and possession. The parties would be referred as arrayed in the plaint.

2. The relevant facts in brief are that the plaintiff filed the civil suit No. 55/1992 on 1-6-1992 for mesne profits and possession of disputed open land with the averments that one quarter situated in south of the disputed land marked ABCD in the site-plan was let-out to late Sh. BasantiLal, father of all the three defendants. The defendants came into possession of the disputed plot by way of trespass on 1-10-1989. The plaintiff asked the defendants to vacate it and also served a notice dated 19-4-1991 by registered post making the demands to pay mesne profits @ Rs. 1500/- per month and to vacate this land. The defendants did not comply with the notice. The plaintiff prayed for a decree of mesne profits for a period of ten months from 1-8-1991 to 31-5-1992 and also prayed for delivery of possession. It was also averred in the plaint that in a earlier suit the plaintiff has claimed mesne profits for a period of 22 months from 1-10-1989 to 31-7-1991 and that civil suit No. 52/1991 between the same parties is pending.

3. The defendants in joint written statement pleaded that the quarter (shop) was let out by the plaintiff on 29-11-1985. Since the disputed plot is situated in front of this shop it is being used by the defendants since the commencement of the tenancy and thus

this open land is part of the rented shop. The facts of committing trespass over this open land on 1-10-1989 have been denied. It was further pleaded that the plaintiff agreed with late Sh. BasantiLal at the time when this shop was given on rent that he would raise a wall of 9 ft width and 15 ft. in length over the plot belonging to the plaintiff to let out to late Sh. BasantiLal and till then monthly rent @ Rs. 125/- of the shop would be paid by late Sh. BasantiLal to the plaintiff. But the plaintiff failed to perform this agreement.

The plaintiff in rejoinder pleaded that such an agreement though took place between the plaintiff and Sh. BasantiLal but the same was cancelled during the lifetime of Sh. BasantiLal and advance amount of Rs. 1,000/- paid to the plaintiff was repaid to Sh. BasantiLal. It was denied that the open land was a part of the rented shop and it was being used by late Sh. BasantiLal since 1985.

5. On the basis of the pleadings of the parties, following issues were framed:-

(Vernacular matter omitted.-Ed.)

6. After recording the evidence of the parties the trial Court decided issue No. 1 in plaintiff's favor that title of the plaintiff over the disputed land has not been challenged. Issue No. 2 was also decided in plaintiff's favor that the defendants came into possession of the disputed plot by committing trespass on 1-10-1989. Issue No. 3 was partly decided in favor of the plaintiff that the plaintiff is entitled to manse profits @ Rs. 250/- per month from 1-10-1989. Issue No. 4 was decided against the plaintiff that he is not entitled to interest over the amount of manse profits. Issue No. 5 was decided in favor of the plaintiff. No decision on issue No. 6 was given as it was beyond the subject matter of the present suit. Issue No. 7 was also decided in the plaintiff's favor. With regard to Issue No. 8 it was decided that the disputed land was not on rent with the defendants or with their father. While deciding all the remaining issues in favor of the plaintiff, the learned District Judge vide impugned judgment dated 11-2-1997 decreed the suit for delivery of possession and manse profits at monthly rate of Rs. 250/-.

7. I have heard learned counsel for the parties and have gone through the pleadings, evidence and the impugned judgment. On the basis of the submissions made before this Court following points arise for consideration:-

(i) Whether this suit was barred as provided under Order 2, Rule 2, C.P.C.

(ii) Whether mesne profits awarded @ Rs. 250/- per month is not justified and

the plaintiff-appellant is entitled to mesne profits at the rate claimed by him.

(iii) Whether the defendant-respondents were and are not in unauthorized occupation of the disputed land.

8. The provisions of Rules 2 and 4 of Order 2 of the Civil Procedure Code being relevant are reproduced as under:-

Rule 2. Suit to include the whole claim.- (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim.- Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs.- A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation.- For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

(4) Only certain claims to be joined for recovery of immovable property.- No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property,

(a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;

(b) claims for damages for breach of any contract under which the property or any part thereof is held; and

(c) claims in which the relief sought is based on the same cause of action :

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property.

9. According to learned counsel for the plaintiff-appellant no such objection was taken in the written statement, hence no issue was framed. Firstly, it was admitted by learned counsel for the plaintiff that since it is a pure question of law, it can be agitated in the first appeal. When learned counsel for the defendants placed reliance upon *Gurubux Singh v. Bhooralal*,¹ learned counsel for the plaintiff-appellant contended that the defendants are now estopped in raising this objection. On the question of applicability of Order 2, Rule 2, C.P.C. the Hon'ble Supreme Court held that as such a plea is a technical one, it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning. In the case before the Hon'ble Supreme Court the defendants though took such a plea in the written statement, but did not produce copy of the earlier plaint. In absence of copy of the plaint, the Hon'ble Supreme Court held that the plea of bar under Order 2, Rule 2, C.P.C. can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the causes of action in the two suits. In the instant case, the certified true copy of the earlier suit has been filed by the plaintiff himself and the same has been marked as Ex. 5. A perusal of the contents of the earlier suit Ex. 5 and the present suit goes to show that both the suits relate to the same land. earlier suit was filed only for manse profits for a period of 22 months from 1-10-1989 @ Rs. 1,000/- per month on the ground that the defendants came into possession over the disputed plot by committing trespass on 1-10-1989 while the present suit was filed on the same ground of committing trespass on 1-10-1989 and for manse profits @ Rs. 1500/- per month for subsequent period and also for delivery of possession. Since the copy of the plaint was placed on the record of the trial Court by the plaintiff and the fact that this objection is legal one, it would be appropriate to consider the same.

10. Learned counsel for the defendants submitted that cause of action i.e. trespass over the disputed land on 1-10-1989 is the same in both the suits and the plaintiff was entitled to claim relief in respect of manse profits as well as delivery of possession in the first suit, hence the second suit on the ground of cause of action is barred. He placed reliance upon *Saghir Hassan v. TayabHasan*,² wherein the view as expressed by learned counsel for the defendants was taken. Reliance was placed upon *Deva Ram v. Ishwar Chand*,³ But the said contention of learned counsel for the defendants does not get support from this judgment. It was also contended that the Hon'ble Supreme Court was to take a similar view in *Gurubux Singh's* case (supra), had a copy of the plaint been filed by the defendants and thus the obiter-dictum of the Hon'ble Supreme Court is binding. No doubt the obiter- dictum of the Hon'ble Supreme Court is binding

on this Court but the Hon'ble Supreme Court did not make any such observation on this point and learned counsel for the plaintiff rightly, submitted that since the copy of the plaint was not on record the Hon'ble Supreme Court did not decide the controversy with reference to Rule 4 of Order 2, C.P.C. According to learned counsel for the plaintiff the view of the Allahabad High Court was taken into consideration by Full Bench of Punjab and Haryana High Court and vide majority view this view was not found to be correct. He placed reliance upon *AbburiRangamma v. ChitrapuVenupurnachandraRao*, ⁴*Sadhu Singh v. Pritam Singh*, ⁵(Full Bench) and *ShrikantPanachand Shah v. WalubaiPanachand Shah*, ⁶ and contended that cause of action for mesne profits of the property is quite distinct from the cause of action for recovery of immovable property. This submission appears to be acceptable in view of these three judgments of Hon'ble Andhra Pradesh, majority view of Punjab and Haryana and Bombay High Courts. In para 34 of the judgment delivered in Sadhu Singh case (supra) it was observed that mere technicalities of procedure should not be allowed to an extent so as to erode even the substantive rights of possession to property. On the above said opinion if an unfortunate litigant under some misapprehension or wrong advise or perhaps due to financial disability for sustaining a suit for possession sues for mesne profits in the first instance and omits or fails to sue for possession of the property at the same time then subsequently even his substantive right to recover his own immovable or valuable property against a mere trespasser would become barred. The end-result, therefore, would be that a valuable substantive right to property would be lost by a mere procedural error or disability. Such a situation has necessarily to be avoided unless, of course, it is the only and inevitable rule deducible from the unequivocal provisions of a statute and this is certainly not the case here. It is also significant to say here that the earlier suit, according to learned counsel for the parties, is still pending on account of subsequent suit. Had such an objection been taken in the written statement, the possibility cannot be ruled out that the plaintiff might have added the prayer for recovery of possession also in the earlier suit by way of amendment. In view of the entire discussion made hereinabove, the present suit was not barred under Order 2, Rule 2, C.P.C.

11. According to site-plan Ex. 2 the measurements of the disputed plot are 30'-9" in the east, 31'-6" in the west and 37 ft. from north to south. Out of this land a strip of 3'-4" in width was allowed to be used by late Sh. BasantiLal as an approach way to the quarter let-out to him and this remaining portion of the plot, according to the plaintiff is in unauthorized possession of the defendants. According to learned counsel for the plaintiff-appellant the trial Court did not take into consideration the oral testimony in

absence of any documentary evidence. Placing reliance upon *Saukhan v. State of Rajasthan*,⁷ it was contended that this approach was contrary to the law of evidence. Vide this judgment this Court held that evidence consists of two kinds-oral or the documentary. When the oral evidence is admissible under the law, the same cannot be rejected only on the ground that documentary evidence is not produced. But in the instant case, the trial Court has not rejected the oral evidence on this ground alone that no documentary evidence has been produced, rather the trial Court having taken into consideration the entire evidence came to this conclusion that the plaintiff is not entitled to mesne profits at the rate claimed in the plaint. Section 2(12) of C.P.C. defines 'mesne profits'. Mesne profits of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made, by the person in wrongful possession. According to learned counsel for the plaintiff-appellant the trial Court did not take into consideration those profits which the plaintiff might have received. He placed reliance upon *S. Kumar v. G. R. Kathpalia*,⁸ *Delhi, Shyamacharan v. SheojeeBhai*,⁹ and *Smt. Krishna Prakash v. DilipHarelMitraChenoy*,¹⁰ In view of these judgments while determining the mesne profits the Court has to take into consideration the market rental value prevailing at the relevant time. Learned counsel for the plaintiff referred the oral statements of the witnesses examined on behalf of the plaintiff and submitted that there was no reason not to rely upon the same. He also referred application under Order 41, Rule 27, C.P.C. filed in this Court and contended that the statement of the defendant Sh. PremNarain was recorded on 5-2-1995 in some other connected case and the statement of one Sh. Amar Chand was recorded on 15-1-1998 and the same may be taken on record and the rate of properties in Baran district as determined by the Collector, Baran on 28-6-1996 may also be taken into consideration as according to this report the value of the disputed land comes to Rs. 650/- per sq.ft. According to learned counsel for the defendants the statement of the defendant PremNarain and the report of the Collector are the documents which came into existence prior to impugned judgment and thus there is no reason for not placing the same before the trial Court and it was also submitted that these documents are not necessary at all to decide this appeal and the disputed land has been valued to the tune of Rs. 1 lac by the plaintiff himself. It was also submitted that prevailing market rental rate has not even been pleaded by the plaintiff and the decision of the trial Court on this point does not call for any interference.

12. I have considered the rival submissions. As far as the application under Order 41,

Rule 27, C.P.C. is concerned, it was held by the Hon'ble Supreme Court in *BillaJagan Mohan Reddy v. BillaSanjeev Reddy*,¹¹ that the Appellate Court can receive additional evidence if it considers to be needed in the interest of justice. As per Order 41, Rule 27, C.P.C. the additional evidence may be allowed by the Appellate Court if it is satisfied that the trial Court refused to admit such evidence which ought to have been admitted or the party seeking to produce the evidence could not produce the same after due diligence or the Appellate Court requires any document to enable it to pronounce the judgment or for any other substantive cause. In the instant case, the statement of the defendant Sh. PremNarain given in some other connected case as well as the report of the District Collector, Baran with regard to rates of various kinds of lands of Baran district were in existence prior to the decision of the trial Court and there seems to be no good reason not to place the same before the trial Court. Otherwise also, these documents are not required by this Court to enable it to pronounce judgment in these appeals. It is also significant to say here that the plaintiff himself fixed Rs. 1 lac as value of the disputed land and now contrary to that it cannot be said that the value of this land was more than Rs. 7 lacs at the time of filing the suit. It is also correct to say that no prevailing market rate of the rents of such lands in nearby area has been pleaded by the plaintiff and further there is no reliable evidence to prove that the prevailing rent of the similar lands was Rs. 1500/- per month as claimed by the plaintiff. It is significant to say here that vide notice Ex. 3 dated 19-4-1991 and according to the earlier suit, the plaintiff claimed mesne profits @ Rs. 1000/- per month and for subsequent period the same was claimed @ Rs. 1500/- per month without giving any explanation or reason for such a difference in the rate of mesne profits. Coming to the oral evidence the plaintiff Rajmal admitted in examination-in-chief that there was no basis to claim mesne profits at the rate claimed in this plaint. Although at present the rate is Rs. 5000/- per month. But he has given no basis of Rs. 5000/- per month even at the time of his statement recorded on 25-8-1995. According to the statement of P.W. 2 Sh. Vimal Chand he purchased the plot from the plaintiff in the year 1987. It was also stated by him that he offered Rs. 1500/- per month as rent for the disputed plot to the plaintiff. But such a simple statement cannot be relied upon to determine mesne profits @ Rs. 1500/- per month. It is also important to observe that no reason has been assigned by Sh. Vimal Chand as to why the plaintiff did not let-out this plot to him on monthly rent of Rs. 1500/-. It is also significant to say that no such statement was given even by the plaintiff himself. P.W. 3 Sh. Jaiprakash stated that the disputed land was given to him at monthly rent of Rs. 1000/- by the plaintiff in February, 1988. His statement was also rightly disbelieved by

the trial Court as no rent receipt was produced by him and further no such statement was given even by the plaintiff himself. Therefore, on the basis of the oral testimony of the plaintiff the trial Court rightly did not determine the mesne profits @ Rs. 1500/- per month. The quarter (shop) situated in the south of the disputed plot was given on rent to Late Sh. BasantiLal in the year 1985. Area of this shop as per Ex. 2-site-plan is 12'9" x 17'7". This shop was let-out at monthly rent of Rs. 125/- and later on the rent was enhanced to Rs. 250/- per month. Keeping in view this rent of the shop, the learned trial Judge rightly determined the mesne profits of the disputed open land at monthly rent of Rs. 250/-. Thus, no interference is called for on the decision of the trial Court on this point.

13. At the very outset learned counsel for the defendants admitted that the disputed land was not in the tenancy of the defendants. According to learned counsel since this open land was situated in front of the quarter in the tenancy of the defendants and the defendants and their father were carrying on repair and body-building of the trucks etc., hence this open land was being used by them since the tenancy and the tenants-defendants have acquired the right as lessee in view of Section 108(B)(d) of the Transfer of Property Act, 1882. He placed reliance upon *Md. Ahmed Amolia v. Nirmal Chandra Roy*,¹² and *SubodhGopal Bose v. Burmah Shell Oil Storage and Distributing Co. of India, Ltd.*,¹³ In reply, learned counsel for the plaintiff- appellant submitted that it is not a case of accession, rather it is a case of encroachment and no such plea was taken by the defendants before the trial Court. I have considered the rival submissions. As per Section 108(B)(d) of the Transfer of Property Act if during continuance of the lease any accession is made to the property, such accession shall be deemed to be comprised in the lease. Accession is a mode of acquiring property as an addition to existing property by natural growth or by application of human labour. In the instant case, no right by way of accession has been acquired by the defendants because only the quarter having boundaries was let-out to the defendants and the open land of the plaintiff-landlord lying nearby and in front of the rented shop was not available to the defendants by way of accession and thus the said land cannot be deemed to be comprised in the rented shop. In *SubodhGopal Bose's* case (supra), the point was as to whether the tenant encroaching upon others land can claim title by adverse possession and the answer was in negative. Similar view was taken by the Calcutta High Court in *Md. Ahmed Amolia and others' case* (supra) and thus this point is decided against the defendants.

14. Learned counsel for the defendants pointed out that mesne profits for a period of

ten months commencing from 1-8-1991 to 31-5-1992 was claimed in the present suit while the trial Court has allowed mesne profits from 1-1-1989 which is the subject-matter of the earlier suit which is still pending. This submission is correct. Hence the decree with regard to the period of mesne profits commencing from 1-10-1989 is beyond the scope of the relief prayed by the plaintiff in the present suit.

15. In the result, the appeal No. 135/1997 filed by the plaintiff is dismissed while the appeal No. 144/1997 filed by the defendants is partly allowed and the impugned decree is modified to this extent that the plaintiff would be entitled to receive the mesne profits as awarded by the trial Court w.e.f. 1-8-1991 and rest of the decree is affirmed.

Ordered accordingly.

Cases Referred.

1. AIR 1964 SC 1810
2. AIR 1940 All 524
3. AIR 1996 SC 378
4. AIR 1966 AP 325
5. AIR 1976 Punjab and Haryana 38
6. AIR 1997 Bom 216
7. 1990 (2) Raj LW 543
8. 1999 (1) Ren CR 431
9. 1971 Rent CJ 127 (MP): (AIR 1971 MP 120)
10. AIR 2002 Delhi 81
11. (1994) 4 SCC 659
12. AIR 1978 Cal 312
13. AIR 1957 Cal 67