

RAJASTHAN HIGH COURT

Munnir Mohammad

Vs.

Noor Mohammad

C.S.A. No. 238 of 1999

(A.C. Goyal, J.)

09.09.2004

JUDGEMENT

A. C. Goyal, J.

1. This is the second appeal under Section 100, C.P.C. filed by the defendant against the judgment and decree dated 17-4-1999 whereby learned Additional District Judge No. 4, *Jaipur City, Jaipur* affirmed the judgment and decreed dated 18-3-1993 passed by the learned Additional *Munsif (East), Jaipur City, Jaipur*.

2. Briefly narrated the facts are that the plaintiffs-respondents (hereinafter to be referred as the plaintiffs) filed a civil suit on 29-4-1974 for declaration and possession of some portion of the house No. 926 situated in Rasta Khandar, Gali Tripolia Wali, Chowkri Gangapole, Jaipur with the averments that the plaintiffs are the owners of the house which has been marked 'Ka' in the map annexed to the plaint. It was further averred that there is a Medi (room) along with open space which has been marked 'Kha' over the property marked 'K'. The defendant who belongs to the family of the plaintiffs is residing in the portion marked 'Kha' with the permission of Abdul Latif father of the plaintiffs for 8 to 9 years. This portion was neither purchased nor constructed either by the defendant or his father. This portion 'Kha' was purchased by the father of the plaintiffs through Court auction and after his death, the plaintiffs are in possession as owners. It was next pleaded that since this house was in damaged condition, they obtained permission of the Municipal Council on 10-8-1972 for reconstruction of the said house. Thereupon, the defendant filed a civil suit against the plaintiffs on 28-2-1973 claiming himself to be the owner of this Medi 'Kha' with a prayer for permanent injunction. The plaintiffs, thereafter, vide notice dated 27-8-1973 revoked the license and asked the defendant to hand over the possession. House,

it was prayed that the plaintiffs be declared owner of this house 'Kha' and possession be delivered to them.

3. The defendant vide his written statement while admitting this fact that house marked 'Ka' in the map is in possession and ownership of the plaintiffs, denied the averments made with regard to house marked 'Kha'. The defendant came out with a plea that this Medi along with open space is in his possession since long as owner. In the alternative, it was pleaded that the defendant's possession over the house 'Kha' is for last 12 years and thus he has become the owner by adverse possession also.

4. On the basis of the pleadings, issues were framed. Evidence was recorded. Learned Additional Munsif (East), *Jaipur City, Jaipur* vide judgment dated 18-3-1993 decided issue No. 1 that the plaintiffs are the owners of this property, that the plaintiffs being the owners, are entitled to get the possession of this house from the defendant; that the defendant failed to prove his adverse possession and thus decreed the suit. It is clarified that issues Nos. 3 and 6 relating to valuation of the suit property were already decided against the defendant on 2-9-1986.

5. The defendant preferred Civil First Appeal No. 39 of 1993 against the judgment and decree dated 18-3-1993. Learned Additional District Judge No. 5, *Jaipur City, Jaipur* vide judgment dated 4-11-1993 affirmed the findings of the trial Court on merits and on all the issues framed by the trial Court, but on objection raised by counsel for the defendant that in spite of specific plea in the written statement no issue on the point of limitation was framed, the Appellate Court remanded the case to the trial Court with a direction to frame issue only on the point of limitation and to decide the same after recording the evidence of the parties.

6. The trial Court, accordingly, framed the issue on limitation, recorded evidence on this issue and vide order dated 2-2-1995 decided this issue against the plaintiffs and made a further direction that the case file may be placed before the First Appellate Court.

7. The plaintiffs preferred Civil First Appeal No. 17/1995 against this order dated 2-2-1995. Learned Additional District Judge No. 4, *Jaipur City, Jaipur* vide judgment dated 13-12-1996 allowed this appeal, set aside the order of the trial Court dated 2-2-1995 and affirmed the judgment and decree of the trial Court dated 18-3-1993.

8. The defendant preferred S. B. Civil Second Appeal No. 102/1997 against the judgment dated 13-12-1996. This Court vide judgment dated 6-5-1998 held as under :-

"Consequently, the impugned judgment and decree dated 13-12-1996 passed by ADJ No. 4, *Jaipur City, Jaipur* in Civil Regular First Appeal No. 17/1995 is quashed and set aside. The learned District Judge, *Jaipur City, Jaipur* is directed to call for the file of Appeal No. 39/1993 pending before ADJ No. 5, *Jaipur City, Jaipur* and send the same to the Court of ADJ No. 4, *Jaipur City, Jaipur* so that both the appeals i.e. Appeal No. 39/1993 and Civil Regular First Appeal No. 17/1995 shall be heard fresh and decided together in accordance with law."

In pursuance of this order the learned Additional District Judge No. 4 called for the file of Appeal No. 39/1993 and file of Appeal No. 17/1995. Civil Appeal No. 39/1993 was renumbered as Appeal No. 49/1998. Both the appeals No. 17/1995 preferred by the plaintiffs and Appeal No. 49/1998 preferred by the defendant were decided vide impugned judgment dated 17-4-1999. The appeal No. 17/1995 preferred by the plaintiffs was allowed while appeal No. 49/1998 filed by defendant was dismissed and thus the judgment and decree dated 4-11-1993 were ultimately affirmed. Hence, this second appeal by the defendant.

9. This Court framed following substantial questions of law on 14-12-2000 :-

(1) Whether the first appellate Court, while remitting an issue to the trial Court on point of limitation under Order 41, Rule 25, Civil Procedure Code, was required to await return of the evidence from the trial Court together with its findings thereon and the reasons, thereof maintaining decree passed by the trial Court on 18-3-1993, if so its effect ?

(2) Whether dismissal of the misc. appeal filed by the defendant appellant against the judgment and decree dated 4-11-1993, will preclude the appellant to reagitate the findings recorded by first appellate Court on 4-11-1993, within the meaning of sub-section (2) of Section 105 of C.P.C. ?

(3) Whether the judgment and decree passed by first appellate Court under appeal is *per se* illegal and without jurisdiction, because it is based on findings recorded in the earlier judgment and decree dated 4-11-1993, passed by first appellate Court, although an issue on limitation was remitted to the trial Court under Order 41, Rule 25, C.P.C. ?

(4) Whether the question relating to limitation in a suit is required to be taken soumotu notice by the Courts of law as envisaged under sub-section (1) of

Section 3 of the Indian Limitation Act even if no plea of limitation is raised by any of the party to the suit ?

(5) Whether the first appellate Court has no jurisdiction to affirm the findings of trial Court dated 18-3-1993 vide its judgment dated 4-11-1993 ?

(6) Whether the first appellate Court has reversed the findings of limitation, recorded by trial Court without meeting cogent and convincing reasons giving by the trial Court?

(7) Whether the mandatory provisions envisaged under Section 110 of Indian Evidence Act, are attracted in the facts and circumstances of the present case?

(8) Whether the plea of mesne profits can be raised in second appeal without paying court fee and also without, seeking such relief before the trial Court?

10. I have heard counsel for the parties.

11. Questions Nos. 1 to 3 and 5 :- These questions are co-related, hence are taken up together. Before advertng to the rival submissions, it would be appropriate to reproduce the provisions of Order 41, Rules 23, 23A, 24, 25 and Section 105, C.P.C.

23. Remand of case by Appellate Court.- Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject all just exceptions, be evidence during the trial after remand.

23A. Remand in other cases. - Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23.

24. Where evidence on record sufficient Appellate Court may determine case finally,-

Where the evidence upon the record is sufficient to enable the Appellate Court

to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.- Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall returned the evidence to the Appellate Court together with its findings thereon and the reasons therefor (within such time as may be fixed by the Appellate Curt or extended by it from time to time).

Section 105.Other orders. - (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction, but, where a decree is appealed from , any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

12. A perusal of the provisions of Rule 23 C.P.C. goes to show that this Rule is not applicable in the instant case as the trial Court did not dispose of the suit upon a preliminary point, rather the trial Court decided the suit on merits. Rule 23A C.P.C. also seems to be not applicable as the decree of the trial Court dated 18-3-1993 was not reversed in appeal vide judgment dated 4- 11-1993. The provisions of Rule 24, C.P.C. might have and should have been applied by the First Appellate Court instead of remanding the case on the point of limitation as a perusal of the evidence available on the case file of the trial Court goes to show that there was sufficient evidence on the record to enable the Appellate Court to decide the point of limitation also. As per the provisions of Rule 25, Civil Procedure Code. The Appellate Court may, if necessary, frame issue or issues and refer the same for trial to the trial Court and the

trial Court shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor within such time as may be fixed by the Appellate Court. Thus, the submission made by learned Counsel for the defendant appellant appears to be justified that the First Appellate Court was required to await the return of the evidence together with its findings and the reasons thereon. Learned counsel for the plaintiffs respondents, on the other hand, contended that the judgment dated 4-11-1993 was challenged by the defendant in this Court and that Misc. Appeal was dismissed by this Court, hence the appellant-defendant is precluded from disputing the correctness of the judgment dated 4-11-1993. It is not in dispute that the defendant preferred S.B. Civil Misc. Appeal No. 274/1994 against the aforesaid judgment of remand dated 4-11-1993 and that Misc. Appeal was dismissed as not maintainable having become infructuous in view of the dismissal of the suit itself vide order dated 2-2-1995 whereby the trial Court decided the issue of limitation against the plaintiffs. In *Bairagi Charan Mohanti v. Basanta Priya Devi*,¹ it was held that no appeal lies against an order of remand under Order 41, Rule 25. Hence, sub-section (2) of Section 105, C.P.C. is no bar in questioning the findings recorded by the First Appellate Court on 4-11-1993. Similar view was taken in *Gopi Nath Shukul v. Sat Narain Shukul*² *Upendra Lal Gupta v. Jogesh Chandra Roy*,³ and *Gogula Gurumurthy v. Kurimeti Ayyappa*,⁴

13. The crucial point for consideration is whether the First Appellate Court while remitting the issue of limitation to the trial Court should not have recorded its findings on the issues decided by the trial Court or in other words whether the First Appellate Court has no jurisdiction to affirm the findings of the trial Court dated 18-3-1993 vide its judgment dated 4-11-1993 ?

14. Learned counsel for the defendant appellant contended that the First Appellate Court was not required to decide the appeal on merits in view of the objection raised by the appellant-defendant on the point of limitation and thus the judgment of the First Appellate Court on issues decided by the trial Court is without jurisdiction being contrary to the provisions of Rule 25 of Order 41, C.P.C. per contra, learned counsel for the respondents contended that firstly there is no bar in deciding the issues on merits under Rule 25, C.P.C. and secondly no such objection was raised on behalf of the appellant- defendant when learned Additional District Judge No. 5 proceeded to decide the issues on merits vide judgment dated 4-11-1993.

15. I have considered the rival submissions. A careful study of the provisions of Rule 25 of Order 41, C.P.C. goes to show that there is no bar in deciding the issues on

merits raised in first appeal before remitting the case to the trial Court to frame and try any issue which the trial Court omitted to frame or try the same. A perusal of the judgment dated 4-11-1993 clearly shows that no such objection was taken by the appellant -defendant that the appeal should not be heard on merits before the findings of the trial Court on the issue of limitation. Rather, learned counsel for both the parties argued the first appeal on merits and consequently the First Appellate Court gave its findings on all the issues on merits and thereafter when the question of limitation was raised the First Appellate Court referred the same to the trial Court to frame the issue on limitation and decide the same after recording the evidence. In view of the entire discussion made hereinabove, it is held that the First Appellate Court has jurisdiction to affirm the findings of the trial Court vide judgment dated 4-11-1993 and the impugned judgment and decree dated 17-4-1999 is not *per se* illegal and without jurisdiction.

16. Questions No. 4 and 6 :- Section 3(1) of the Limitation Act, 1963 (in short the Act, 1963) is as under :-

3. Bar of Limitation. - (1) Subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defense.

17. A perusal of the said provision makes it clear that the Court is required to consider the question of limitation even no objection is taken. In the instant case, although the trial Court did not frame issue of limitation but after remand this issue was decided by the trial Court as well as the First Appellate Court.

18. Now the question remains for consideration is as to whether the First Appellate Court reversed the findings of the trial Court on the issue of limitation without giving any cogent and convincing reasons. The trial Court vide order dated 2-2-1995 observed that though the defendant failed to prove his adverse possession, the plaintiffs also failed to prove as to when they granted permission to the defendant to reside in the disputed property and thus the suit is not within limitation in accordance with the Article 65 of the Act, 1963.

19. The First Appellate Court vide impugned judgment dated 17-4-1999 held that since the suit was filed before expiry of 12 years period the defendant claimed himself to be the owner of the disputed property by way of adverse possession was decided by the trial Court against the defendant and was affirmed in first appeal vide judgment

dated 4-11-1993 and thus the trial Court committed an error in deciding the question of limitation against the plaintiffs. In view of the judgment of the First Appellate Court, the submission made by learned counsel for the appellant defendant that the First Appellate Court reversed the findings without meeting cogent and convincing reasons given by the trial Court is devoid of merit. Article 65 of the Act, 1963 provides that a suit for possession of immovable property based on title may be filed within 12 years when the possession of the defendant becomes adverse to the plaintiff. The trial Court vide judgment dated 18-3-1993 decided the issue No. 4 of adverse possession against the defendant. It was held by the trial Court having taken into consideration the evidence that the defendant failed to prove his adverse possession over the disputed property. It was specifically held by the trial Court that the plaintiffs filed the suit before expiry of 12 years the defendant claimed himself to be the owner of the disputed property by way of adverse possession.

The trial Court did not take into consideration the findings recorded on issue No. 4 while deciding the question of limitation vide order dated 2-2- 1995. The First Appellate Court having considered the evidence on the record in a proper manner rightly set aside the findings of the trial Court on the issue of limitation.

20. Question No. 7 :- Section 110 of the Indian Evidence Act, 1872 (in short the Act, 1872) provides that when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner. Learned counsel for the appellant-defendant contended that it was the case of the plaintiffs themselves that the defendant is in possession of the disputed house though as licensee and not as the owner, therefore, it was for the plaintiffs to prove that the defendant is not the owner of the disputed house, but the plaintiffs failed to prove it and the findings of the Courts below on this issue are perverse as the findings are based only on one previous judgment which is Ex. 1. It was also contended that the previous judgment Ex. 1 is not applicable as *res judicata* as provided under Section 11, C.P.C. He placed reliance upon some of the judgments. In *Ram Das v. Salim Ahmed*,⁵ it was held that for declaration of title to the suit property under Section 34, C.P.C. of the Specific Relief Act, 1963 weakness in defendant's claim for title to the property cannot establish plaintiffs title. Plaintiff is not entitled to get declaration of the title if such title could not be established by him by leading convincing evidence. In view of this judgment, it is correct to say that weakness in defendant's claim for title is no ground to declare the plaintiff's title if plaintiff could not establish his title by convincing evidence. In

Ladhuram v. SurajBux, ⁶it was held in accordance with Section 110 of the Indian Evidence Act that when plaintiff is found in possession of disputed property, there is presumption of ownership and the fact that other portion of the house is in possession of the defendant is not sufficient to disturb the presumption in plaintiffs favour. In *Gram Panchayat of Village Naulakha v. Ujagar Singh*, ⁷ it was held that decision in a suit for injunction is not binding on question of title, even though issue on title was framed in the suit of injunction and incidental finding on question of title was given. In *Ramesh Chandra v. Shiv CharanDass*⁸it was held that when there was no occasion for the appellate Court to make the observation when there was neither pleading nor evidence, finding cannot operate as res judicata. In *M/s. Ram Mohan and Co. v. M/s. Ganesar Ginning Co. P. Ltd. Coimbatore*, ⁹it was held that when suit ended in favour of lessee, lessee had no scope for filing appeal against mere finding and thus the said finding cannot operate as res judicata. Similar view was taken by this Court in *Tara Singh v. Smt. Shakuntala*, ¹⁰

21. Per contra, learned counsel for the plaintiffs-respondents contended that Ex. 1 judgment operates *res judicata* as question of title has already been decided against the appellant-defendant. Reliance is placed upon *SulochanaAmma v. Narayanan Nair*,¹¹. It was also contended that the findings of the trial Court as well as the First Appellate Court on the question of title and adverse possession are concurrent and are not based only on the judgment Ex.1 and there is no ground to interfere with the concurrent findings of the Courts below.

22. I have considered the rival submissions. Ex. 1 is the judgment dated 17-1-1977 delivered by Additional Munsif, Jaipur City (East), Jaipur in civil suit No. 525/1973. This suit was filed by Munir Mohammad-the appellant before this Court against Noor Mohammad and Siraj (respondents No. 1 and 3 before this Court). This suit was filed for permanent injunction with regard to the disputed property with the averments that the property on the ground floor (which has been marked 'K' in the instant case) belongs to the defendants and is in their possession while the Medi along with open space (marked 'Kha' in the instant case) belongs to the plaintiff and is in his possession since long. This suit was resisted by the defendants. Issues were framed including the issue of the ownership of the disputed property i.e. Medi and the open space. The trial Court having considered the evidence of both the parties clearly held that the plaintiff completely failed to prove his ownership of this Medi. It was further held that contrary to it the evidence of the defendants is reliable as the defendants have proved that this Medi was purchased in Court auction by Sh. Abdul Latif-father

of the defendants and this fact of purchase in auction was admitted one and further the defendants have proved sale certificate of this property which proves the title of this Medi in favor of the defendants (plaintiffs-respondents in the instant case). It is not in dispute that learned Additional Munsifvide Ex. 1 judgment granted relief of injunction in favor of the plaintiff on account of his possession. In view of the judgment of Madras High Court delivered in M/s. Ram Mohan and Co. and the judgment of this Court delivered in Tara Singh's case (both supra) since the suit of the plaintiff (the defendant in the instant case) for permanent injunction was decreed, he was not in a position to go in appeal against the finding on the issue of title, hence the finding of title would not operate as *res judicata* in the instant case. The judgment of the Hon'ble Supreme Court delivered in SulochanaAmma's case (supra) is not applicable in the instant case as the judgment of the Hon'ble Supreme Court on the question of *res judicata* was given with reference to decree of a Court of limited pecuniary jurisdiction. But the judgments of the Courts below in the instant case are not based upon the previous judgment Ext. 1. Both the Courts below considered the entire evidence on the question of title as well as adverse possession and arrived at concurrent finding that the plaintiffs have proved their title by their oral as well as documentary evidence and the defendant-appellant failed to prove his title by adverse possession over the disputed property. The submission made by learned counsel for the appellant- defendant that sale certificate was not produced by the plaintiffs is not enough to set aside the concurrent findings of the Courts below on the question of title. No case is made out that the findings of the two Courts below are contrary to the evidence on the record and are perverse. The High Court in second appeal under Section 100 C.P.C. can set aside the findings of the Courts below only when the same are perverse on account of mis-reading or wrong-reading of evidence available on the record. Thus, in view of the entire discussion made hereinabove, the question No. 7 is decided accordingly that though the provisions of Section 110 of the Indian Evidence Act are attracted but the concurrent findings of the Courts below on the question of title and adverse possession do not call for any interference in this second appeal.

23. Question No. 8 :- This question has not been raised by the defendant- appellant. Learned counsel for the respondents submitted that the defendant- appellant did not vacate the suit house, hence manse profits may be granted to the respondents and they will pay the Court fee as ordered by this Court. Learned counsel for the appellant-defendant contended that no such plea was taken in the plaint, no prayer was made before the trial Court as well as before the First Appellate Court and thus in absence of pleadings, it would not be possible in second appeal to determine the manse profits.

24. Having considered the above submissions I am of the view that in absence of any such plea and prayer before the trial Court as well as before the First Appellate Court, it is not possible to consider and grant relief of manse profits as it is not possible to determine the rate of manse profits in absence of any facts on this point.

25. Consequently this second appeal is hereby dismissed with costs.

Appeal dismissed.

Cases Referred.

1. AIR 1969 Ori 67
2. AIR 1923 Alla 384
3. AIR 1928 Cal 186
4. AIR 1974 SC 1702
5. (1998) 9 SCC 719
6. 1957 Raj LW 647
7. AIR 2000 SC 3272
8. 1990 (2) U. J. (SC) 720: (1990 All LJ 885)
9. AIR 2000 Mad 1
10. AIR 1974 Raj 21
11. AIR 1994 SC 152