
(2019) 09 RAJ CK 0254
In the Rajasthan High Court
Case No : Civil Second Appeal No. 35 Of 2016

Babu Lal	Vs	APPELLANT
Pukhraj		RESPONDENT

Date of Decision : 27-09-2019

Acts Referred:

Citation : (2019) 09 RAJ CK 0254

Hon'ble Judges : Sandeep Mehta, J

Bench : Single Bench

Advocate : Pritam Solanki, R.C. Joshi

Final Decision : Dismissed

Judgement

Heard learned counsel for the parties and perused the material available on record.

The instant civil second appeal has been preferred by the appellant Babu Lal for assailing the judgment-cum-decree dated 05.10.2015 passed by the learned Additional District Judge No.2, Bikaner in Appeal No.16/2015 whereby she affirmed the judgment-cum-decree dated 17.02.2014 passed by the learned Additional Civil Judge No.2, Bikaner in Civil Suit No.348/2009 (404/2005) whereby, the suit for injunction filed by the plaintiff-appellant was rejected.

The plaintiff-appellant filed the suit in question with the averment that he has a house (the surroundings whereof were described in para No.1 of the plaint) located at the Chopra Bari, Ganga Sahar. He was residing in the house with his father for the last 30 years. The area in which the house was located in an area of 'Kacchi Basti' and the Municipal Corporation, Bikaner was in the process of issuing pattas and regularizing the possession of the respective occupants. He had filed an application for regularisation with the Municipal Corporation, Bikaner annexing therewith, the proof of the old possession and the house of the plaintiff was included in the survey report. He had taken electricity and water connections on the plot in question and the address was also mentioned in the Ration Card.

The house of the defendant was located opposite to the house of the plaintiff. The plaintiff used to access his house through the road located on the north side, for which, the plaintiff had easementary rights. The defendant had openly declared that he had purchased the plaintiff's plot as well as the road passing in front thereof and that he would take possession thereof. On 09.09.2005, the defendant hurled an insinuation at the plaintiff that he would be ousted and dispossessed from his house. With these averments the plaintiff filed the suit seeking the relief of permanent and mandatory injunction against the defendant. The defendant filed a written statement as well as a counter claim averring therein that the plaintiff had neither any right, title or interest in the said premises nor was he in possession on the plot in question. The neighborhood set out in the suit were non-existent. No application for regularization filed by the plaintiff was pending with the Municipal Corporation, Bikaner nor was his name included in the survey list. The suit was filed with misleading averments. The plaintiff had taken illegal possession on a piece of Government land a few years ago. The defendant's plot was situated adjacent to the plot on which the plaintiff had raised unauthorised construction on 25.08.2005. The plaintiff also tried to take possession of the defendant's plot for which, a criminal case was registered. In the counter claim, the defendant prayed that a decree be issued against the plaintiff that he should not interfere in the possession of the defendant on the questioned plot, the map whereof was annexed with the counter claim. The plaintiff filed rejoinder to the written statement as well as the counter claim disputing the contentions made therein. The trial Court framed the following issues for consideration:-

"पत्रावली का अवलोकन किया गया। उभय पक्षों के तर्कों पर मनन किया गया। हस्तगत प्रकरण में वादी की ओर से वाद दिनांक 08.07.2014 को न्यायालय में पेश किया गया है। वादी के वाद का जवाब प्रतिवादीगण की ओर से दिनांक 25.02.2015 व 18.04.2015 को पेश किया गया है तदुपरान्त प्रकरण में उभय पक्षकारान की उपस्थिति में दिनांक 01.07.2015 को विवाद्यक कायम किये गये हैं। विचारण के इस प्रक्रम पर वादी द्वारा उक्त प्रार्थना पत्र पेश किया जाना केवल मात्र प्रकरण के विचारण को विलम्बित एवं बाधित करने की मंशा को परिलक्षित करता है। चूंकि वादी द्वारा वाद के मूलभूत ढांचे में सारतः एवं प्रभावी रूप से परिवर्तन चाहा गया है, जिसकी आज्ञा/अनुमति नहीं दी जा सकती है। इस प्रक्रम पर वादी द्वारा चाहा गया संशोधन सद्भाविक प्रतीत नहीं होता है। उक्त संशोधन से वाद की प्रकृति एवं अनुतोष दोनों में ही बदलाव की संभावना है। अतः इस प्रक्रम पर प्रार्थी/वादी का प्रार्थना पत्र स्वीकार किया जाना न्यायोचित प्रतीत नहीं होता है। फलतः वादी नाथुलाल की ओर से प्रस्तुत प्रार्थना पत्र आदेश 06 नियम 17 व सपठित धारा 151 सि०प्र०सं० दिनांक 02.12.2017 अस्वीकार कर खारिज किया जाता है।

पत्रावली वास्ते साक्ष्य वादी दिनांक 31.08.19 को पेश हो।"

The plaintiff submitted his affidavit by way of examination-in-chief appeared to give evidence as PW-1. However, the cross examination could not be completed as the plaintiff did not appear in the Court to depose whereupon his evidence was closed. At the stage of the defendant's evidence, he withdrew his counter claim and did not choose to lead any evidence. The trial Court proceeded to hold that as the plaintiff failed to appear for cross examination, despite repeated opportunities and his evidence was closed because of his absence; the

examination-in-chief of the plaintiff would not be read in evidence and accordingly, it was an inescapable conclusion that the plaintiff did not lead any evidence to establish the issues. Accordingly, the suit was rejected and decreed against the plaintiff by the judgment dated 17.02.2014. It may be mentioned here that during the pendency of the suit, no application whatsoever was filed by the plaintiff to reopen his evidence. Also, no prayer was made to this effect before the appellate Court. Accordingly, the Appellate Court too, rejected the appeal of the plaintiff by judgment and decree dated 05.05.2015 and thereafter, the instant second appeal has been preferred.

Shri Pritam Solanki, Advocate representing the plaintiff-appellant urged that the prayer to set aside the order closing the evidence of the plaintiff can even be made in the second appeal and thus, in order to secure the ends of justice and provide an opportunity to the plaintiff to prove the issues, the matter should be remanded to the trial Court with a direction that one opportunity of leading evidence should be provided to the plaintiff. However, this submission is vehemently opposed by counsel representing the respondent.

I have considered the submissions advanced at Bar and have carefully perused the impugned judgments as well as the record.

It is amply clear from the order sheets of the trial Court that the plaintiff avoided to appear before the trial Court on numerous dates of hearing for completion of the cross examination. Repeated opportunities were given by the trial Court in this regard but the plaintiff failed to avail the same. Thus, the evidence of the plaintiff was closed by the trial Court vide order dated 20.09.2013 which was never challenged during trial. Though, Shri Solanki tried to buttress that even at the stage of second appeal, the plaintiff can be given opportunity of leading evidence but on going through the material available on record, I am duly satisfied that no plausible justification was ever shown by the plaintiff before the trial Court and nor has any such justification being shown to this Court as to why the plaintiff failed to appear in the trial Court for completion of cross examination despite the repeated opportunities.

In this background, I am of the firm opinion that the instant second appeal does not involve any substantial question of law. Two Courts of competent jurisdiction have recorded concurrent findings of fact against the appellant while rejecting the suit as well as the first appeal. The impugned judgments do not suffer from any infirmity whatsoever warranting interference. Hence, the appeal fails and is hereby dismissed as being devoid of merit.

Decree be prepared accordingly. Record be returned to the trial Court forthwith.