
(1987) 08 AHC CK 0007
In the Allahabad High Court
Case No : Second Appeal No. 2892 of 1986

Hafiz Mukhtar Ahmad and Another	Vs	APPELLANT
Mumtaz Ahmad and Others		RESPONDENT

Date of Decision : 12-08-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 3, Order 41 Rule 21, 100

Citation : (1987) 08 AHC CK 0007

Hon'ble Judges : K.P. Singh, J

Bench : Single Bench

Advocate : S.A. Ansari, for the Appellant;

Judgement

K.P. Singh, J. 1. This second appeal has been directed against the judgment of Shri Ravindra Nath Misra, VIth Additional District Judge, Azamgarh,. dated 27.10.1986 in Civil Appeal No. 249 of 1985 Mumtaz Ahmad v. Hafiz Mukhtar.

2. Shorn of unnecessary details the disputed land in this appeal is plot No. 31 situate in Mohalla Domanpura, Kasba Maunath Bhanjan, district Azamgarh. Undisputedly the aforesaid plot belonged to one Jai Karan who had two sons, namely Ram Briksh and Jhillu. The Plaintiffs Appellants before this Court are the transferee from Ram Briksh whereas the Defendants Respondents are transferees from Jhillu. The dispute between the parties is whether the disputed plot had been partitioned between Ram Briksh and Jhillu before the execution of sale deeds by them. The Plaintiffs Appellants had filed the suit for injunction against the Defendants Respondents restraining them from interfering with the title and possession of the Plaintiffs. The claim of the Plaintiffs was denied by the Defendants opposite parties and various other issues were raised at the instance of the Defendants opposite parties. The trial court framed necessary issues and decreed the Plaintiffs' suit through its judgment dated 25.05.1985. Against the judgment of the trial court the Defendants had gone in appeal and the appellate court gave judgment for the Defendants opposite parties as is evident from the impugned judgment dated 27.10.1986. Thereafter the Plaintiffs have approached

this Court u/s 100 Code of Civil Procedure.

3. The learned Counsel for the Plaintiffs Appellants has contended before me that the Plaintiffs did not get reasonable opportunity before the lower appellate court to press their claim and that the impugned judgment is ex-parte against them and suffers from patent errors of law, therefore, it should be set aside. The learned Counsel for the Defendants opposite parties has tried to refute the contentions raised on behalf of the Plaintiffs Appellants and his submission is to the effect that the impugned judgment is on merits and it cannot be said that the Plaintiffs Appellants had not been heard by the lower appellate court.

4. The learned Counsel for the Defendants-Respondents has also tried to seek help from the provisions of Order 17 Rules 2 and 3 of the CPC and has contended that the impugned judgment is on merits and it cannot be assailed on the ground that the Plaintiffs Appellants had not got sufficient and reasonable opportunity to press their claim. In this connection it has also been submitted that in appeal against the impugned judgment and decree passed by the lower court, the question of sufficiency of the cause of absence before the lower appellate court cannot be gone into by this Court. The learned Counsel for the Defendants opposite parties has placed reliance upon a number of decisions, such as Musammatt Hummi and Another Vs. Aziz-Ud-Din, ; AIR 1925 644 (Oudh) ; Brij Nath Prasad v. Bindeshwari Pd. Singh AIR 1925 Pat 609 and AIR 1934 131 (Oudh) .

5. In rejoinder the learned Counsel for the Plaintiffs Appellants has drawn my attention to the rulings reported in Patit Pavneshwar Mahadev Ji-Appellant v. Nagar Maha Palika, Kanpur-Respondent, 1979 AWC 305 and it has been contended that the submission made on behalf of the Defendants Respondents cannot be sustained in view of the aforesaid rulings.

6. I have examined the contentions raised on behalf of the parties and I have gone through the impugned judgment. I have a feeling that the Plaintiffs Appellants have not got a reasonable opportunity before the lower appellate court to press their claim. It is well known that every party to a litigation should get reasonable opportunity of addressing the Court.

7. In the present case the learned lower appellate court has observed that it had heard the counsel for both the parties. In the facts and circumstances of the present case the above statement is patently erroneous. On 24.10.1986 the lower appellate court had passed the following order:

Shri R.K. Mishra for Appellant finished his argument Shri Abdul Mufid for Respondents was standing in court for some time but left it after some time and did not turn up. Shri Ishtiaq Ahmad, Advocate, could not argue the case and went to call Shri Abdul Mufid but did not turn up. Now it is 2.10 P.M. Argument of the Respondents is closed Fix 27.10.1986 for judgment.

8. In view of the above quoted order, it appears to me that the appellate court

has wrongly observed that it had heard the counsel for both the parties. Since the Plaintiffs Appellants did not get fair opportunity to press their claim before the lower appellate court and the impugned judgment contains a wrong fact regarding hearing of the counsel for both the parties, I think the impugned judgment suffers from patent error of law and deserves to be set aside.

9. As regards the submission of the learned Counsel for the Defendants Respondents that sufficiency of cause for absence on the date of hearing cannot be examined in appeal against the decree passed by the lower appellate court and the only remedy left open to the Plaintiffs Appellants for pressing that ground was only by way of an application for setting aside i.e. impugned decree by the lower appellate court, I think that the submission made on behalf of the Defendants Respondents is not correct. The ruling of this Court reported in *Musammat Hummi and Another Vs. Aziz-Ud-Din*, has been considered in the later ruling reported in 1979 AWC 305. A Division Bench of this Court has rightly distinguished the case of *Mst. Hummi and Anr.* reported in AIR 1917 All. 475 and has answered the reference made by a learned Single Judge vide para 10 as below:

Our answer to the question referred to us is that it is open to the court hearing appeal against an ex parte decree to go into the ground of non-appearance of the defaulting party unless it be debarred from doing so either under the doctrine of res-judicata or any other positive rule of law.

10. In the present case I have indicated above that the lower appellate court has wrongly observed that it had heard the counsel for the parties. Since the Plaintiffs-Appellants were not properly heard by the lower appellate court in the facts and circumstances of the case, the impugned judgment is really an ex parte judgment against them and there exists sufficient cause for the absence of the Plaintiffs Appellants before the lower appellate court. Therefore, the impugned judgment deserves to be set aside.

11. The bare perusal of the order dated 24.10.1986 passed by the lower appellate court would indicate that the Plaintiffs were handicapped to press their claim as their senior counsel was not available. The Senior counsel was present in the court room for some time and leaving a junior counsel to attend the case he went to attend another case and thereafter the junior counsel could not argue the case and went to call the senior counsel but could not return back till 2.10 P. M., therefore, the lower appellate court closed the arguments of the Respondents. I think that the Plaintiffs Appellants are not at fault even if technically some mistake can be fastened to the counsel for the Plaintiffs Appellants. The impugned judgment cannot be characterised as a judgment after hearing the counsel for the parties. In my opinion there exists sufficient cause for setting aside the impugned judgment dated 27.10.1986 and I am unable to accept the statement of the learned Counsel for the Defendants Respondents that the cause of absence could not be examined by this Court in Second appeal against the judgment and decree of the first appellate court. I am fortified by

the ruling reported in Patit Pavaneshwar Mahadev Ji v. Nagar Mahapalika Kanpur, 1979 AWC 305.

12. The learned Counsel for the Defendants Respondents has not been able to cite any decision before me that the analogy of Order 17 Rule 3 CPC would apply to the facts and circumstances of the present case which is fully covered by the provisions of Order 41 of the Code of Civil Procedure.

13. The submission of the learned Counsel for the Defendants Respondents to the effect that the only remedy open to the Plaintiffs Appellants was to file an application Under Order 41 Rule 21 of the CPC is not acceptable to me. The Plaintiffs Appellants had both the remedies; one by approaching this Court in Second Appeal and another by filing an application Under Order 41 Rule 21 CPC. The submission of the learned Counsel for the Defendants Respondents in this regard is ill-founded and deserves outright rejection.

14. In the result, the above noted Second Appeal succeeds and the impugned judgment and decree passed by the lower appellate court on 27.10.1986 in Civil Appeal No. 249 of 1985 Mumtaz Ahmad v. Hafiz Mukhtar is hereby set aside and the case is remanded back to the lower appellate court for deciding the First Appeal after hearing the counsel for the parties within three months from the date of the receipt of this judgment and the lower court's record from this Court. The office is directed to send back the record of the lower courts forthwith. Parties are directed to bear their own costs of this appeal.