

(2019) 03 CHH CK 0102
In the Chhattisgarh High Court
Case No : Second Appeal No. 841 Of 1999

Kedar Nath Pandey And Ors

APPELLANT

Vs

Heera Lal Jaiswal And Ors

RESPONDENT

Date of Decision : 12-03-2019

Acts Referred:

Code Of Civil Procedure 1908 — Section 100, Order 41 Rule 27

Citation : (2019) 03 CHH CK 0102

Hon'ble Judges : Sanjay K. Agrawal, J

Bench : Single Bench

Advocate : Dheerendra Pandey, A.K. Prasad, Rakesh Pandey, S.K. Agrawal

Final Decision : Dismissed

Judgement

Sanjay K. Agrawal, J

(1) This second appeal preferred by appellants No. 1 to 5/defendants only was admitted for hearing by this Court on 3.12.1999 on the following substantial question of law :-

"Whether the land in dispute on which the house of the appellants No. 1 to 5 is standing is part of Khasra No. 490/2 belonging to the plaintiff or it is a part of Khasra No. 491 belonging to the appellants No. 1 to 5 ?"

(For the sake of convenience, parties would be referred hereinafter as per their status and ranking shown in the suit before the trial Court).

(2) Original plaintiff- Heera Lal Jaiswal filed a suit for declaration of title, recovery of possession and permanent injunction stating inter alia that he is owner and title holder of the suit land bearing Khasra No. 490/2, area 0.08 decimal, which he has purchased by unregistered sale deed dated 20.03.1949 (Ex.P-1) from one Kaloo Kumhar, S/o Girdhari Kumhar for a consideration of Rs.100/- and became owner and title holder of the suit land, in which defendants No. 1 to 3 have encroached on 4.8.1996 and constructed kachha house without authority of law,

as a result thereof his son - Mahendra Pratap has lodged complaint on 8.4.1986 to the Chief Municipal Officer, Municipal Council, Ramanujganj but no action was taken in this regard, as such, other defendants No. 4 to 7 have also encroached upon the suit land, and therefore, the plaintiff is entitled for declaration of title and possession after demolition of superstructure constructed by defendants No. 1 to 7. (3) Defendants No. 1 to 3 have filed their written statement stating inter alia that suit land is part of Khasra No. 491 owned by them, as such, the plaintiff is not entitled for decree of declaration of title, recovery of possession and permanent injunction.

(4) The trial Court, after appreciating oral and documentary evidence available on record, dismissed the suit. The plaintiff preferred first appeal thereagainst. The First appellate Court, vide impugned judgment & decree, has decreed the suit of the plaintiff holding him to be the owner and title holder of the suit land and the defendants have unauthorizedly encroached upon the suit land. Questioning that judgment and decree passed by the first appellate Court, this second appeal has been preferred in which the substantial question of law has been formulated for consideration and which has been catalogued in the opening paragraph of the judgment.

(5) Learned counsels appearing for the appellants/defendants would submit that defendant No. 3 has constructed the Kachha house on the land bearing Khasra No. 491, which he owned and it is not a part of Khasra No. 490/2, therefore, the first appellate Court was unjustified in decreeing the suit of the plaintiff. (6) Per contra, learned counsel appearing for the LR's of respondent No. 1/plaintiff relying upon Exs.P-21, P-26 & P-27 would submit that the first appellate Court is absolutely justified in decreeing the suit of the plaintiff holding him to be the owner and title holder of the suit land, which is a finding of fact and is not liable to be interfered with, and, therefore, the substantial question of law framed by this Court be answered in affirmative and the appeal be dismissed. (7) I have heard learned counsel for the parties and considered their rival submissions made hereinabove and went through the record with utmost circumspection.

(8) The first appellate Court while setting aside the judgment and decree of the trial Court has clearly reached to the conclusion that original plaintiff - Heera Lal Jaiswal was the owner of suit land and defendants No. 1 to 5 have encroached over 0.03 decimal of the suit land relying upon demarcation report (Ex.P-21) filed and proved by the plaintiff.

(9) Original plaintiff has clearly stated in the plaint that defendants No. 1 to 3 on 5.8.1986 have encroached upon three decimal of the plaintiff's land from the northern side of the suit land shown in the map attached with the plaint with red ink, which has been denied by defendants No. 1 to 3 by filing their written statement before the trial Court, in which, in paragraph 8 it has been asserted that defendants No. 1 to 3 are in possession of their land bearing Khasra No. 491, area 0.08 decimal.

(10) In order to prove the encroachment by defendants, the plaintiff has filed demarcation report (Ex.P-21) dated 11.06.1984 i.e. prior to the institution of the suit as the suit was instituted on 16.03.1988, in which, it has clearly been stated that original defendant No. 1 -Shri Narbadeshwar Pandey @ Narbada Pandey has encroached upon 880 sq. ft. by making fencing. For the sake of convenience, Ex.P- 21 is extracted below :-

सेवा में,

श्रीमान् नजुल अधिकारी महोदय, पाल

विषय:- सिमांकन संबंधी प्रतिवेदन ।

महोदय,

निवेदन है कि नगर रामानुजगंज के सर्वे 490/2 क्षेत्रफल 3488 वर्गफीट 0.08 दर्ज है । मौके पर हीरा लाल पिता कालिका प्रसाद का कब्जा नहीं पाया गया ।

1. श्रीमति आमना खातुन का 25" X 51" = 1275 वर्गफीट पर परछी हाता बनाकर काबिज है ।
2. खुरजा जा बुकर नगर राणगंज के कब्जे में 35" X 20" = 700 वर्गफीट पर परछी हाता बनाकर काबिज है ।
3. नर्मदा पाण्डेय नगर राणगंज के कब्जे में 40" X 22" = 880 वर्गफीट घेरा डालकर काबिज है ।

शेष भूमि 633 वर्गफीट खाली है । अतः सिमांकन प्रतिवेदन नक्सा अन्दे मेन्टेनेन्स खसरे की नकल के साथ समप्रेषित है ।

सही । अस्पष्ट

हस्ताक्षर: 11.6.84"

(11) Heera Lal Jaiswal (PW-1) has proved the said demarcation report (Ex.P-21) and in paragraph 3 of his examination-in-chief, he has clearly stated that he got the suit land demarcated vide Ex.P-21; challan dated 29.1989 vide Ex.P-22 and the copy of maintenance Khasra is Ex.P-23. He has also reported the matter to the Chief Municipal Officer, Ramanujganj vide Ex.P-26 and its receipt is Ex.P-27. As such, the demarcation report (Ex.P-21) clearly states that original defendant No. 1 - Narbadeshwar Pandey @ Narbada Pandey has encroached upon 880 sq. ft. of the land held by the plaintiff by making fencing /boundary.

(12) Original plaintiff was subjected to lengthy cross-examination on behalf of the defendants but not a single question has been asked questioning the demarcation report (Ex.P-21). As such, fact of demarcation report and encroachment by defendant No.1 are not disputed as stated in demarcation report (Ex.P-21), original plaintiff has not been cross-examined and effect of non cross-examination qua Ex.P-21 the court would presume that the witness statement has been accepted by other side as the cross-examination is a matter of substance and not of procedure, one is required to put one's own version in cross-examination of opponent. (13) In Muddasani Venkata Narsaiah (dead) through Legal representatives Vs. Muddasani Sarojana (2016) 12 SCC 288, their Lordships of the Supreme Court have clearly held that cross-examination is a

matter of substance, and it is not a procedure. Relevant paragraphs of report state as under:-

"15. Moreover, there was no effective cross-examination made on the plaintiff's witnesses with respect to factum of execution of sale deed, PW 1 and PW 2 have not been cross-examined as to factum of execution of sale deed. The cross-examination is a matter of substance not of procedure one is required to put one's own version in cross-examination of opponent. The effect of non-cross-examination is that the statement of witness has not been disputed. The effect of not cross-examining the witnesses has been considered by this Court in Bhoju Mandal v. Debnath Bhagat AIR 1963 SC 1906. This Court repelled a submission on the ground that the same was not put either to the witnesses or suggested before the courts below. Party is required to put his version to the witness. If no such questions are put the Court would presume that the witness account has been accepted as held in Chuni Lal Dwarika Nath v. Nartford Fire Insurance Co. Ltd 1957 SCC OnLine P &H 177 : AIR 1958 P & H 440.

16. In Maroti Bansi Teli v. Radhabai w/o Tukaram Kunbi & Ors. AIR 1945 Nag 60, it has been laid down that the matters sworn to by one party in the pleadings not challenged either in pleadings or cross- examination by other party must be accepted as fully established.

The High Court of Calcutta in A.E.G. Carapiet v. A.Y. Derderian 1960 SCC Online Cal 44 : AIR 1961 Cal 359 has laid down that the party is obliged to put his case in cross-examination of witnesses of opposite party. The rule of putting one's version in cross-examination is one of essential justice and not merely technical one. A Division Bench of Nagpur High Court in Kuwarlal Amritlal v. Rekhilal Koduram & Ors. AIR 1950 Nagpur 83 has laid down that when attestation is not specifically challenged and witness is not cross-examined regarding details of attestation, it is sufficient for him to say that the document was attested. If the other side wants to challenge that statement, it is their duty, quite apart from raising it in the pleadings, to cross-examine the witness along those lines. A Division Bench of Patna High Court in Karnidan Sarda & Anr. v. Sailaja Kanta Mitra AIR 1940 Patna 683 has laid down that it cannot be too strongly emphasized that the system of administration of justice allows of cross-examination of opposite party's witnesses for the purpose of testing their evidence, and it must be assumed that when the witnesses were not tested in that way, their evidence is to be ordinarily accepted. In the aforesaid circumstances, the High Court has gravely erred in law in reversing the findings of the first Appellate Court as to the factum of execution of the sale deed in favour of the plaintiff."

(14) In view of the principle of law laid down by their Lordships of the Supreme Court, it is held that the defendants have not challenged the demarcation report (Ex.P-21), in which the fact of encroachment by defendants over the plaintiff's land to the extent of 880 sq. ft. has clearly been indicated in demarcation conducted much prior to the filing of civil suit by the plaintiff way back on

16.03.1988 and, as such, the fact of encroachment on the plaintiff's land by original defendant No. 1 - Narbadeshwar Pandey @ Narbada Pandey is clearly established. Not only this, immediately thereafter, plaintiff's son - Mahendra Pratap Jaiswal, vide Ex.P-27, had made complaint to the Chief Municipal Officer, Ramanujganj that defendant No. 1- Narbadeshwar Pandey @ Narbada Pandey is forcefully making construction on his land owned by his father, as such, fact of encroachment by original defendant No. 1- Narbadeshwar Pandey @ Narbada Pandey and construction on the land owned by the plaintiff i.e. Khasra No. 490/2, area 0.03 decimal is clearly established.

(15) Original defendant No.1 - Narbadeshwar Pandey @ Narbada Pandey has relied upon the document (Ex.D-1) to say that he is in possession of the land bearing Khasra No. 491 but Ex.P-1 is only Nazri Naksha and it is not a demarcation report and, therefore, it is not helpful to defendant No.1 to establish that he has not encroached upon the plaintiff's suit land, as such, the First Appellate Court has rightly held that original defendant No.1 / present defendants have encroached upon the plaintiff's land in which they are in possession after making encroachment and the said finding recorded by the First Appellate Court is a finding of fact based on the material available on record. It is neither perverse nor contrary to the record. (16) It is well settled that this Court in jurisdiction under Section 100 of the Code of Civil Procedure can interfere with the finding of fact recorded by the first appellate court only if the finding is perverse or contrary to the record. As recorded hereinabove, there is no perversity or illegality in the finding of fact recorded by the First appellate Court, as such, the first appellate Court is absolutely justified in holding that defendants No. 1 to 5 have encroached upon the plaintiff's land, and in possession of the suit land, which is a part of Khasra No. 490/2 and, therefore, the plaintiff is entitled for decree for possession.

(17) As a fallout and consequence of the aforesaid discussion, the substantial question of law is answered in favour of the plaintiff and against the defendants.

(18) Application {I.A. No. 10/2019} filed by appellants No. 7 & 8 under Order 41 Rule 27 of the Code of Civil Procedure for taking additional evidence on record is rejected as this Court by order dated 3.12.1999 only entertained the appeal of appellants No. 1 to 5, as such, no appeal preferred by appellants No. 7 & 8 is pending consideration, therefore, I.A. No. 10/2019 is rejected, consequently I.A. No. 11 filed by appellants No. 7 & 8, for formulating additional substantial question of law also stands rejected.

(19) In view of foregoing, the second appeal being devoid of merit is liable to be and is hereby dismissed leaving the parties to bear their own costs. A decree be drawn up accordingly.