
(1958) 09 RAJ CK 0005
In the Rajasthan High Court
Case No : Second Appeal No. 82 of 1954

Kundan Mal and Others

APPELLANT

Vs

Thikana Siryari and Others

RESPONDENT

Date of Decision : 23-09-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, 100, 101
Specific Relief Act, 1877 — Section 54

Citation : AIR 1959 Raj 146 : (1959) RLW 175

Hon'ble Judges : K.K. Sharma, J

Bench : Single Bench

Advocate : Manak Mal, for the Appellant; Kishore Singh, for the Respondent

Final Decision : Allowed

Judgement

K.K. Sharma, J.—This is an appeal against the appellate judgment and decree or the learned Civil Judge, Sojat in a suit for perpetual injunction and damages against the defendant-respondents. The plaintiff's suit was that certain plots had been let out by him to the defendants Nos. 2 to 7 and they were irrigated by a well known as "Kirawa" on the outskirts of the village Siryari. The defendants executed a deed of release in favour of the plaintiff on Baisakh Sud 15th, Smt. 2005.

In accordance with that release deed, he handed over possession of the plots and the well in dispute to the plaintiff. The defendants, however, sub-sequently interfered with the irrigation of the plots in dispute from the well in dispute. It was prayed that the defendants be restrained by a perpetual injunction from interfering with the plaintiff's irrigation of the field from the well in dispute and that Rs. 20/- be awarded by way of damages. This suit was filed in the Court of the Munsiff, Sojat on 31-5-1949.

2. The defendants filed a written statement. All the defendants excepting Krishna defended the suit. They denied having executed any deed of "re-of(sci) lease in

favour of the plaintiff and having made over possession of the plots and the well to the plaintiff. Learned Munsiff framed several issues and parties produced their evidence. During the pendency of the suit, the plaintiff applied for amendment on 9-3-1951 praying that the prayer for possession of the property in dispute be added in the plaint. Learned Munsiff found the application for amendment very much belated.

He consequently rejected the application for amendment and proceeded to decide the suit on the plaint, as it stood. He found that from the evidence, it was proved that the plaintiff was not in possession of the property in dispute. On this ground alone, he refused the prayer for injunction as well as for damages. As regards the execution of the deed of release, he held that it had been executed by the defendant,

3. The plaintiff went in appeal and the application for amendment was pressed before the lower appellate Court also. Learned Civil Judge, who heard the appeal, does not appear to have been inclined to reject the prayer for amendment on the ground of its having been made late, but he maintained the order of dismissal of the application on the ground that if the amendment prayed for be made, the jurisdiction of the Civil Courts would be ousted.

On the evidence, he held that the plaintiffs were not in possession of the property in dispute and consequently held that the suit for injunction only was not maintainable in the circumstances of the case. The judgment of the learned Civil Judge is dated 12-12-1953 and it is against this judgment and decree of the learned Civil Judge that the plaintiffs have come in second appeal.

4. I have heard Shri Manakmal on behalf of the plaintiff-appellants and Shri Kishore Singh on behalf of the defendants-respondents.

5. Mr. Manakmal at first argued that the finding of both the lower Courts that the plaintiff was not in possession of the property in dispute was erroneous. This argument of his cannot be sustained as both the Courts have given a finding of fact on a consideration of evidence and therefore, this Court would not be justified in reversing the concurrent finding of the lower Courts in this respect.

6. Mr. Manak Mal next argued that even though the plaintiff be not in possession of the property in dispute, the suit for injunction was maintainable. He referred to a ruling of the Bombay High Court in the case of Fakirbhai Bhagwandas and Another Vs. Maganlal Haribhai and Another, and another of the Madras High Court in the case of Muthayyan Swaminatha Sastrial and Others Vs. S. Narayanaswami Sastrial and Others, I have gone through these rulings and find that they are not helpful to the plaintiff. In the Fakirbhai Bhagwandas and Another Vs. Maganlal Haribhai and Another, it was held that :

"It is not necessary for the person claiming injunction to prove his title to the suit land. It would suffice if he proves that he was in lawful possession of the same and his possession was invaded or threatened to be invaded by a person,

who had no title whatever."

That is no authority for the proposition that even though the plaintiff may not be in possession of the property, he can file a suit for permanent injunction only. In the Madras case also cited by the learned counsel for the appellants, it was observed that :

"Where the allegation of the plaintiff is that he is in lawful possession of the properties and that his possession is threatened to be interfered with by me defendants, he is entitled to sue for a mere injunction without adding prayer for declaration of his rights."

This ruling is also no authority for the proposition that although the plaintiff is not in possession of the property in dispute, he can sue for injunction only.

7. The third and the last point raised by the learned counsel for the appellants is that the application for amendment ought not to have been refused on the ground on which it was refused. It was argued that the lower Courts ought not to have concerned themselves with the fact as to what would happen after amendment had been made. It was argued that the application for amendment was made in the trial Court itself.

There was no undue delay and the nature of the suit would not have been changed as the cause of action would have remained the same, and only an additional relief would have been inserted if the application for amendment were allowed. It was argued that in the circumstances of this case, the application could not be justly dismissed on the ground of being late. As regards the question as to whether after the amendment was allowed, the Civil Courts would continue to have jurisdiction in the suit, it was argued that that question should have arisen after the amendment had been made.

The Court could then return the plaint for presentation to the proper Court, but it was not quite just to dismiss the application for amendment on the consideration that if the amendment were allowed, jurisdiction of the Civil Courts would be ousted. Reliance was placed upon a ruling of the Hyderabad High Court in case of *Goverdhan Bane v. Government of the Union of India* AIR 1953 Hvd 212.

8. Learned counsel for the respondents relied upon a ruling of the Madras High Court in the case of *Singara Mudaliar v. Govindaswarni Chetty* AIR 1928 Mad 400. In that case, the suit was filed originally in the City Civil Court, Madras and was transferred to the High Court in the exercise of its extraordinary original civil jurisdiction. Later, an application to amend the plaint was made, the effect of which was to convert the suit into one which the City Civil Court (the forum originally chosen by the plaintiff) would have no jurisdiction to try.

It was held that the amendment could not be allowed as the powers of the High Court under Clause 13 are those of the City Civil Court itself. Learned counsel also argued that the application of the plaintiff for amendment was very much belated as he did not file the application for amendment although the question of

non-maintainability of the suit on account of want of possession had been before him almost as soon as the suit was filed.

9. I have considered the arguments of both the learned counsel.

10. It is true that if the suit as framed were beyond the jurisdiction of the lower Courts, they would have had no jurisdiction to make any amendment. However, from the plaint as it stands, it cannot be said that the lower Court had no jurisdiction in the suit when it was filed. The Civil Courts would have been, therefore, perfectly justified in exercising their powers of amendment, even though the consequence of the amendment would be that the suit might become beyond the jurisdiction of the Civil Courts. If as a result of amendment, the suit becomes one not cognizable by Civil Courts, they would have to return the plaint for presentation to proper Court.

It very frequently happens that the suits are under-valued in the beginning and the objection is raised and the valuation is increased with the: result that in some cases, the case goes out of the jurisdiction of the Court in which it was filed and then the plaint is returned for presentation to the proper Court. It cannot be said that because at a later stage it comes out that the suit is not within the jurisdiction of the Court in which it was filed as a result of amendment, the Court in which it was originally filed had no jurisdiction, from the very beginning. I am, therefore, inclined to agree with the ruling of the Hyderabad High Court in the case cited above (AIR 1953 Hyd 212). It was held that :

"While considering whether an amendment should be allowed or not, the Court ought not to go on the merits of the case. If, after allowing the amendment, the Court comes to the conclusion that the Court has no jurisdiction, the Court could return the plaint to the plaintiff to be presented in the proper Court."

In the ruling of the Madras High Court (AIR 1928 Mad 400) relied on by the learned Counsel for the respondents and also by the lower appellate Court, it was held that no Court will permit a plaint to be so amended as to oust its own jurisdiction to try the suit. No reasons have been given for this view, nor has any authority been cited in the judgment. With all respect to the learned Judge of the Madras High Court, who decided that case, I regret, I am unable to find myself in agreement with the view taken therein.

11. Coming to the question of the application for amendment being made late, certainly there was some delay in the making of the application, but on this ground alone the application for amendment should not have been rejected as the defendants could have been saddled with costs. The mistake was technical inasmuch as one of the reliefs, which was necessary, was not prayed for and such a relief could be added by way of amendment, subject to the payment of the costs.

12. I, therefore, allow the appeal, set aside the decrees of the lower Courts and send the case back to the first Court with a direction that the amendment as

prayed by the application dated 9-3-1951, shall be made subject to the payment of Rs. 25/- as costs by the plaintiffs. In case, the costs are paid within fifteen days from the notice of the receipt of the record in the lower Court, the amendment shall be made and then the suit would be decided in accordance with law. If the costs are not paid as ordered above, the record shall be sent back to this Court and the case would be put up for the dismissal of the appeal.