
(2013) 01 RAJ CK 0219
In the Rajasthan High Court
Case No : Civil Second Appeal No. 247 of 2012

Lal Shankar

APPELLANT

Vs

Kachru and Laxi

RESPONDENT

Date of Decision : 29-01-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2, Order 14 Rule 5, Order 41 Rule 1, Order 41 Rule 35, Order 43 Rule 1

Citation : (2013) 2 CDR 944 : (2013) 3 RLW 2394

Hon'ble Judges : Narendra Kumar Jain, J

Bench : Single Bench

Advocate : Manoj Joshi, for the Appellant;

Judgement

Narendra Kumar Jain-II, J.—Heard learned counsel for the appellant at the stage of admission of this appeal This second appeal under Sec. 100 of the CPC has been filed by the appellant-defendant No. 1 Lal Shanker against the order dt. 30.5.2012 passed by the learned Additional District Judge (Fast Track), Dungarpur, Rajasthan (hereinafter referred to as "the appellate Court") in Civil First Appeal No. 7/2009 (2/2005), whereby the appellate Court remanded the suit back to the Court of Civil Judge (S.D.), Sagwara, District, Dungarpur (hereinafter referred to as "the trial Court") for decision afresh and set aside the order of the trial Court passed in Civil Suit No. 53/96 on 28.01.2005, whereby the suit filed by the plaintiff-respondent No. 1 Kachru for declaration and permanent injunction was ordered to be returned to the plaintiff to file the same before the revenue Court having jurisdiction.

2. Brief facts giving rise to this second appeal are that the plaintiff-respondent No. 1 Kachru filed a suit for declaration and permanent injunction on 06.07.1996 alleging, inter alia, therein that his agricultural land bearing Khata No. 261, Khasra No. 1900 situated at Pipalwala Rakba 6 Biswa, Kismu Sukhi-1, Mauja Gada, Jasrajpur is the ancestral property of the plaintiff, which is registered in the name of Laxi-respondent No. 2. The plaintiff is the son of Laxi and, therefore,

he is joint Khatedar in the said property being its shareholder. It was also stated in the paint that the said property had been equally divided by the respondent No. 2 between plaintiff and his brother Jeevan. Appellant Lal Shanker had unauthorizedly got the said property registered by cheating Laxi in the name of exchange of land and no amount of money was paid by him to respondent No. 2-Laxi. It was also stated in the plaint by the respondent No. 1 Kachru-plaintiff that the sale deed dt. 25.02.1995 was got executed by way of cheating and the papers of registry do not have the signatures of any villager as witness and respondent No. 2 Laxi did not have any personal necessity to sell the same. As such, the plaintiff sought a declaration to the effect that the sale deed dt. 25.02.1995 is void and ineffective qua the plaintiff and on the basis of same, the revenue department may not carry out mutation proceedings in favour of the present appellant as being Khatedar.

3. Appellant-Lai Shanker has filed written statement before the trial Court on 30.8.1996 alleging therein that the plaintiff was not the khatedar of the land in dispute and the land was not a paternal land and the plaintiff had no share in the disputed land. It was also alleged that no partition had taken place between plaintiff and his brother Jeevan and Laxi on 12.5.1980. The partition deed was not a registered document and therefore, it did not create any title in favour of the plaintiff. More so, the said alleged partition was reduced in writing subsequently and Laxi had duly and lawfully executed the sale deed dt. 25.2.1995 in favour of the appellant in consideration of Rs. 6000/-, which she had received. The said sale deed dt. 25.02.1995 also contains the signature of Jeevan as witness, as such the said execution of sale deed is not a forged document and the plaintiff has utterly failed to prove as to how the appellant played a fraud with the plaintiff and Laxi.

4. Laxi-respondent-defendant No. 2 has also filed written statement and accepted the pleadings of the plaint filed by the plaintiff-Kachru.

5. On the pleadings of the parties, the learned trial Court framed as many as 3 issues. Thereafter, the appellant filed an application under Order 14 Rule 5 CPC and on the basis of which two new issues viz. Issues No. 2A and 2B were added. Issue No. 2A was related to the point of jurisdiction. The learned trial Court found that since Issue No. 2A was an issue of law, it should be decided preliminary by the Court to avoid further complications and litigations. Therefore, the trial Court decided issue No. 2A in favour of the appellant holding that the suit was triable by the revenue Court and ordered to return the suit to the plaintiff along with certified copies of all the documents to file before the revenue Court.

6. Being aggrieved by the above order, the plaintiff-respondent No. 1 Kachru filed an appeal before the appellate Court. The appellate Court accepted the appeal, set aside the order passed by the trial Court dt. 28.1.2005 and also decided the issue No. 2A regarding the jurisdiction of the Court holding that the suit was triable by the civil Court and remanded the case back to the trial Court to decide

all other issues also.

7. Feeling aggrieved by the judgment passed by the appellate Court dt. 30.5.2012, this second appeal under Sec. 100 CPC has been preferred by the appellant-defendant No. 1.

8. Learned counsel for the appellant firstly submitted that the learned first appellate Court has committed grave error of law in holding that if the trial Court records evidence of both the parties on Issue of law framed in the suit, then the learned trial Court cannot pass the judgment only on the basis of issue of law, whereas it becomes necessary for the trial Court to pass judgment on merits on all issues framed in the suit. The said opinion and conclusion expressed by the first appellate Court is absolutely illegal, incorrect and against the provisions of law.

9. Learned counsel for the appellant further submitted that the learned appellate Court has also failed to appreciate the correct position of law. Preliminary issue can be decided at any stage of the suit and the learned trial Court has rightly decided the issue No. 2A. Present suit filed by the plaintiff-respondent No. 1 is triable by the revenue Court only. He has also suggested some questions of law and prayed for admission of this second appeal.

10. Learned counsel for the appellant further submitted that this second appeal under Sec. 100 CPC is maintainable because the learned trial Court has passed the judgment and decree and the learned first appellate Court has also passed the judgment and decree in this case under Order 41 Rule 1 CPC filed by the plaintiff-Kachru.

11. After hearing the learned counsel for the appellant, first of all, in my opinion, here it is relevant to reproduce the provisions of Order 7 Rule 10 CPC, which are as under:

10. Return of plaint.--(1) Subject to the provisions of Rule 10-A, the plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

Explanation.--For the removal of doubts, it is hereby declared that a Court of appeal or revision may direct, after setting aside the decree passed in a suit, the return of the plaint under this sub rule.

Then, it is also relevant to reproduce the provisions of Order 43 Rule 1, which are as under:

1. Appeal from orders.--An appeal shall lie from the following orders under the provisions of Sec. 104, namely:--

(a) an order under Rule 10 of Order VII returning a plaint to be presented to the proper Court [except where the procedure specified in Rule 10-A of Order VII has been followed]

12. Learned trial Court has passed the following order on 28.1.2005;

13. The provision of Order 14 Rule 2 of the CPC is also relevant in this case, which is reproduced as under:--

[2. Court to pronounce judgment on all issues.--(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.]

14. Looking to the above provisions of law, in my considered opinion, the issue regarding jurisdiction of Court not required any evidence for deciding it can be tried as preliminary issue. As per the above order passed by the learned trial Court he has decided the issue No. 2A as preliminary issue relating to the jurisdiction of the Court and ordered to be returned to the plaintiff along with certified copies of all the documents to file the same before the revenue Court. In my opinion, as per the above referred provisions of Order 43 Rule 1 CPC, an appeal lies against the above order passed by the trial Court before the learned first appellate Court.

15. I have considered the submissions of learned counsel for the appellant. First of all, the question before me is as to whether the order passed by the learned trial Court would amount to a decree. Sub-section (2) of Sec. 2 of CPC defines "decree" as under:

(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within 2[***] Sec. 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation.--A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;

16. In case of Chhela Ram vs. Manak, AIR 1997 Raj 284, it has been observed

that:

ingredients of decree-the decree must contain the essential elements:--

(i) There should be an adjudication.

(ii) The adjudication should determine the rights of parties regarding the matter in controversy.

(iii) The adjudication should be in a suit and the adjudication should be formal and conclusive so far as the Court is concerned.

17. In case of R. Rathinavel Chettiar and Another Vs. V. Sivaraman and Others, it has been observed by Hon"ble Apex Court that:

"Decree" means the formal expression of an adjudication which so far as regards the Court expressing it conclusive determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final on passing of the decree, the rights of parties are crystallised and unless the decree is reversed, recalled, modified or set aside, the parties cannot be divested of their rights under the decree.

18. It is pertinent to note that under clause (a) of sub-sec. (2) of Sec. 2 of the CPC "any adjudication from which an appeal lies from an order" is specifically excluded from being a decree.

19. The chief distinction between an "order" and "decree" is that when in an adjudication, which is a decree an appeal invariably lies therefrom and second appeal also on the grounds mentioned in Sec. 100 CPC. No appeal lies from an order unless it is expressly provided under Sec. 104 or Order 43 of the CPC and in any event no second appeal lies. Both a decree as also an order are formal expressions of adjudication. When a decree conclusively determines the rights of the parties with regard to all or any of the matters, in controversy in the suit, it may be either preliminary or final, it is not so in case of order. The word "judgment" may relate to a decree as also to an order.

20. The definition of an expression "order" has to be taken into view when it was required to be considered whether a particular order amounts to a case decided an order amounting a decision of same right or dispute as to right even it interlocutory in nature may amount to be a case decided.

21. The decision of a Court should become a decree, there must be an adjudication in a suit and such adjudication must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit and such determination must be of conclusive in nature. If those parameters are to be applied, then return of complaint to file the same before the competent Court will amount to a decree.

22. Consequently, in my opinion, order of return of plaint by deciding the preliminary issue is not a decree and that is why there is a provision of appeal

under Order 43 Rule 1 CPC (appeals from orders) and not under Order 41 Rule 1 CPC (appeals from original decree) and second appeal under Sec. 100 CPC against the said order is not maintainable.

23. In my considered opinion, the order passed by the trial Court on 28.01.2005 is an order under Rule 10 of Order 7 and appealable under Order 43 Rule 1(a) CPC and plaintiff-Kachru has wrongly filed the appeal before the first appellate Court under Order 41 Rule 1 CPC and first appellate Court has also wrongly decided the same and wrongly passed the decree also, because the question of drawing a decree under Order 41 Rule 35 would not arise in that appeal. In my opinion, even if formal decree is drawn in prescribed form by both the Courts below or wrongly drawn the decree would not make such an order a decree and any decree drawn pursuant to such an order is immaterial, no body can take undue advantage on mistake on the part of the Court while drawing up decree and the present second appeal is not maintainable.

24. In view of the above discussions, the order to return the plaint to the plaintiff to file the same before the competent Court is not a decree against the above order, appeal lies under Order 43 Rule 1 CPC and order passed in appeal is also not a decree and hence second appeal would not lie under Sec. 100 CPC. Since second appeal is maintainable against a decree and not against an order, therefore, this second appeal, which is directed against the orders passed by both the Courts below is not maintainable. The same is liable to be dismissed as not maintainable and hence it is not necessary for me to examine the controversy involved in this appeal on merits.

25. Accordingly, this second appeal is hereby dismissed. There shall be no order as to costs.

26. Stay application (No. 167/2012) also stands dismissed. Registry is directed to circulate a copy of this judgment to all the Courts of Rajasthan, having civil jurisdiction.