
(1985) 10 RAJ CK 0011

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No. 163 of 1984

Mansoor Ali

APPELLANT

Vs

Legal Representatives of late Allah Bux

RESPONDENT

Date of Decision : 03-10-1985

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10

Citation : (1985) WLN 417

Hon'ble Judges : Kishore Singh Lodha, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Kishore Singh Lodha, J.—The facts giving rise to this appeal briefly stated are that the plaintiff's Mansoor Ali and others filed a suit against the defendant Allah Bux for possession of the property described in para No. 2 of the plaint and for damages alleging that this property was a part of a larger property described in para 1 of the plaint which at one time, belonged to one Smt. Rahniat Bai and she created a Wakf of the property described in para 1 of the plaint in favour of Daudi Boharas, Nathdwara for their masjid and madrasa, etc., by a registered document dated 1-8-1953 and has given them possession over it. Their case further was that thereafter on 7-8-1953, Smt. Rahmat Bai took two shops and tahkhana below them on rent from the Wakf at Rs. 5/- p.m. by a rent note of that date. Term No. 11 of the said rent note provided for that the lease would be for a term of 30 years and if she expired before the expiration of this term, her heirs and successors would not be entitled to retain the possession of the rented apartments. The plaintiffs further alleged that Smt. Rahmat Bai died on 6.11.69 leaving no heirs but the defendant Allah Bux entered into the said rented apartments without any authority. The case of the plaintiffs further was that apart from these rented apartments, Allah Bux took over possession of some other apartments of the property described in para 1 of the plaint, the details of which have been given in para 4 thereof, without any authority. The plaintiffs

alleged that even if Allah Bux is taken to be a successor of Smt. Rahmat Bai, which they do not admit, he was not entitled to occupy the rented apartments after her death nor could he take possession of any other part of the property without the permission of the wakf. The plaintiffs went on to allege that they had obtained permission from the Board of Muslim Wakfs to file the present suit against the defendant u/s 55(2) of the Wakfs Act as they were appointed trustees under the wakf deed dated 1.8.53. Thus the plaintiffs" claimed possession of the property in dispute and a sum of Rs. 1,440 as damages and also asked for future damages @Rs. 60/- p.m.

2. The defendant contested the suit. He pleaded inter alia, that Smt. Rahmat Bai had executed wakf of her property in question vide registered deed dated 29.12.46 in favour of Anjuman Talemul Islam, Udiapur (here in after called "Anjuman") and since then it was in possession of the Anjuman and Smt. Rahmat Bai had taken the shops on rent from the Anjunian by rent note dated 30-12-46. His case further was that in view of this earlier wakf, later wakf dated 1-8-1953 alleged by the plaintiffs, if held proved was invalid as according to the Mohammedan law, a property once given in wakf, cannot be made the subject matter of another wakf. He further alleged that Smt. Rahmat Bai was his Khala and he being her nearest relation after her death, was legitimate successor. He also pleaded that after the death of Smt. Rahmat Bai, he took the shops, tahkhana and the apartments constructed in the stair case wrongly described as a bath room by the plaintiffs on rent from Anjuman on 1-3-1970 on a monthly rent of Rs. 10/- and was thus in lawful possession as a tenant. He also contended that he was using the apartment on the fourth floor with the permission of the Anjuman. According to him, the plaintiffs were not entitled to evict or ask for possession of the suit premises as they had no right to the property. One of the objections raised by him was that the Anjuman was a necessary party in the suit.

3. On these pleadings, the learned Civil Judge Udaipur, framed seven issues as under:

D;k tk;nkn eqrnkfc;k Jherh jfgeu ckbZ us fnukad 1&8&1953 bZ- dks nkmnh cksgjk tekur dks efltn o mlds lkFk pyus okys enjls ds fy, b[kjktkr ds fy, cki dh vkSj mu ,slk oDQ djus dk gd Fkk o tk;t gS \

2- D;k tk;nkn eqrnkfo;k dk ntZ nkok fgLlk Jherh jger ckbZ us 7&8&1953 bZ- dks V?LVh ls fdjk;s ij fy;k \

3- D;k izfroknh dk tk;nkn eqrnfc;k ij dCtk fcyk gLdgdkd gS \

4- D;k vatqeu rkfyey bLyke t:jh ijksd eqdnek gS \

5- D;k ekfy;r nkok de dk;e dh xbZ gS \

6- izfrdkj D;k gS \

7- vk;k nkok bl U;k;ky; dh vkfFkZd vf/kdkfjrk dk ugh gS \

4. After taking the evidence of the parties and hearing them, the learned Addl.

Civil Judge decreed the plaintiffs' suit for possession and also awarded a sum of Rs. 960/- as damages upto the date of the suit and future damages @ Rs. 30/- p.m. The learned Addl. Civil Judge found, under issues No. 1 to 3 that the possession of the property in question was that of the trustees of the Daudi Bohra Samaj under the wakf deed dated 1-8-1953 Ex. 1, that the defendant had trespassed into the disputed apartments on the death of Smt. Rahmat Bai, that even if the earlier wakf had been made in favour of the Anjuman, the plaintiffs had acquired title over the property by adverse possession since 1-8-1953 as the wakf in favour of the plaintiffs had been recognised by the Wakf Board vide the Rajasthan Gezatte dated 1964 and the Anjuman did not appear to have filed any objections. He was thus of the opinion that the plaintiffs were entitled to file a suit against the defendant, who was alleged to be the trespasser.

5. Under issue No. 4, it found that the Anjuman was not a necessary party to the suit as it did not have any possession, management or control over the property in dispute for the last more than 19 years and did not have any subsisting right or interest in it. He further observed that the Chairman and the Secretary of the Anjuman had appeared as witness on behalf of the defendant but did not file any application for becoming party to the said suit. He decided the issues No. 5 and 7 regarding valuation of the suit and jurisdiction of the court against the defendant and decreed the suit as stated above.

6. Being aggrieved of this decree, the defendant filed an appeal. Pending the appeal, Allah Bux died and his legal representatives were brought on record. The learned Addl. District Judge, Rajsamand, who heard this appeal, was of the opinion that the Anjuman was a necessary party and without impleading Anjuman. the questions involved in the suit could not be effectively decided. He was further of the opinion that the present suit was not merely for declaring the defendant a trespasser. He further observed that although at a later stage the office bearer of Anjuman had appeared in the witness box on behalf of the defendant, this is no ground not to implead them as a party specially when the question involved is whether in the presence of the earlier wakf in favour of the Anjuman, the later wakf in favour of the Daudi Bohara Samaj could not be a valid wakf and that question can properly be decided only when the Anjuman is a party to the suit. He, accordingly, set aside the decree of the learned Addl. Civil Judge and directed that under issue No. 4, the Anjuman may be impleaded as a defendant under Order 1 Rule 10 CPC and the suit may be decided after giving them an opportunity of being heard. Aggrieved of this order, of demand, the plaintiffs have now come up in appeal.

7. I have heard the learned counsel for the parties and have perused the relevant material placed before me by the learned counsel for the parties. The question involved before me is short, namely, whether in these circumstances, the learned Addl. District Judge was justified in remanding the case to the trial court for impleading the Anjuman as a party. It has frankly been conceded by the learned counsel for the respondents that the Anjuman cannot be deemed to be a

necessary party to the suit but can only be deemed to be a proper party. If the learned Addl. District Judge was of the view that the Anjuman was a necessary party and it had not been impleaded, he could have dismissed the suit itself. He, however, urges that in the circumstances of the case, the learned Addl. District Judge was justified in remanding the case with a direction to implead the Anjuman in as much as according to the finding of the learned trial court itself, the second wakf in favour of the present plaintiffs could not be taken to be a valid wakf but it decreed the plaintiffs' suit on the ground that they had acquired adverse possession against the Anjuman and such a finding could not have been properly arrived at in the absence of the Anjuman. On the other hand, the learned counsel for the appellants urges that the plaintiffs have come forward with a case that Smt. Rahmat Bai was tenant and after her death, the defendant Allah Bux had entered into possession of the disputed properties as a trespasser. In such a suit, the validity of the second wakf cannot necessarily be said to be in question because even if the second wakf was invalid, the plaintiffs being in possession of the property in dispute for more than the last 19 years, could certainly maintain a suit against the trespasser and trespasser cannot be heard to say that he derives possession from the third party and thus compel the plaintiffs to fight out his case with that third party. In such a case, the plaintiff has to prove his better title than the trespasser. According to him, the learned Addl. District Judge without reversing the findings of the learned Addl. Civil Judge on the other issue, wrongly set aside the decree and decided only issue No. 4. He further urged that the questions involved in the suit could have effectively been decided even in the absence of the Anjuman and therefore the learned Addl. District Judge should not have set aside the decree in favour of the plaintiffs without considering the finding of the learned trial court on the other issues.

8. I have given my careful consideration to the rival contentions and in the circumstances of the case, I am clearly of the opinion that the learned Addl. District Judge was wrong in deciding issue No. 4 against the plaintiffs. The test as to who is a necessary party in a suit has been laid down by this Court in a Full Bench decision reported in Hardeva Vs. Ismail and Others, following a Full decision of the Allahabad High Court reported in Benares Bank v. Bhagwan Das AIR 1947 All. 18. If the learned Addl. District Judge was of the view that the Anjuman was a necessary party he should have dismissed the suit for the non-impleading of a necessary party but he did not do so and, therefore, he also clearly appears to be of the view that the Anjuman was not a necessary party but was only a proper party. Now for the non-impleading of a proper party, the learned Addl. Distt. Judge could not have set aside a decree which had already been obtained by the plaintiff's against the defendant-appellants but he should have decided the questions involved in the suit. It may be pointed out here that the case of the plaintiff's was that they had let out the property to Smt. Rahmat Bai and it was after her death that the defendant had entered into possession as a trespasser. If the plaintiff is able to prove these averments, he will be entitled

to a decree but if he fails to do so, the suit is liable to be dismissed. The trial court has found that the plaintiff has proved the case put forward by him and, therefore, the learned Addl. District Judge could not have set aside the decree without considering the finding of the learned trial court on those other issues. It can not be said that an effective decree cannot be passed against the defendant in the absence of the Anjuman in the present suit. If the defendant is found to be a trespasser, as alleged by the plaintiff, the defendant is bound to be thrown out as soon as the plaintiff establishes his better title and the defendant cannot be heard to say that the better title rests with some third person. The defendant in order to support the claim of his possession, may prove the facts alleged by him but the findings arrived at in this suit would only be limited between the parties to the suit and would not be binding on the Anjuman. In these circumstances, I am of the view that the Anjuman need not have been directed to be impleaded in this suit by the learned Addl. District Judge.

9. It will not be out of place to mention here that the Secretary and President of the Anjuman have already appeared as witnesses for the defendant and they did not choose to make an application to be impleaded as parties to this suit after having come to know of the pendency of the suit and this circumstance also is a very significant circumstance to show that the Anjuman itself is not very much interested in the matter and it is the defendant Allah Bux or his legal representatives who want to take a shelter under the alleged title of the Anjuman. In these circumstances, this handle cannot be allowed to be left in the hands of the defendant.

10. The appeal is, therefore, allowed and the matter is sent back to the learned Addl. District Judge, Rajsamand to dispose of the appeal on merits after hearing the parties on issues other than issue No. 4, which already stands decided now. The costs of this appeal shall abide by the final result of the appeal before the learned Addl. District Judge. The parties are directed to appear before the learned Addl. District Judge, Rajsamand on 4-11-1985.