
(2006) 08 PAT CK 0077
In the Patna High Court
Case No : S.A. No. 23 of 2002

Md. Zafir Mian alias Md. Zafir Alam and Others APPELLANT
Vs
Sk. Mansoor Alam and Another RESPONDENT

Date of Decision : 04-08-2006

Acts Referred:

Citation : (2006) 08 PAT CK 0077

Final Decision : Dismissed

Judgement

S.K. Katriar, J.—Heard Mr. R.K. Verma for the appellants, and Mr. Sidheshwari Prasad Singh for the respondents.

2. The defendants are the appellants against a judgment of affirmance. This appeal is directed against the judgment and decree dated 18.10.2001, passed by the learned 6th Additional District Judge, West Champaran, Bettiah, in Title Appeal No. 84 of 1995 (Md. Zafir Mian and Ors. v. SK. Mansoor Alam and Ors.), whereby he has dismissed the appeal preferred by the defendants, and has upheld the judgment and decree dated 26.9.1995, passed by the learned Sub-Judge-IV, Bettrah, in Title Suit No. 227 of 1988 (Eviction) (Sk. Mansoor Alam and Ors v. Sk. Jafir Mian and Ors.). The learned trial court had decreed the suit for eviction which has been upheld by the learned court of appeal below. We shall go by the description of the parties occurring in the plaint.

3. The plaintiffs instituted the suit-stating that plot Nos.2943, 2939, 2941 and 2938, 2935, 2944 are situate in the township of Bettiah, are adjoining each other. The plaintiffs purchased eleven dhoores of land of plot Nos.2939 and 2943 from Sk. Md. Ajahar Alam through a registered deed dated 27.6.1961, and thereafter came in possession. Sk. Azahar Alam also gave possession of 4 dhoores of land on 31.1.1963 itself after taking consideration money and executed sale deed in favour of plaintiff No. 2. Azahar Alam was in possession of some portion of plot Nos.2938 and 2942. Ajahar Alam gave possession of portion of land to the plaintiffs which was in his possession. It is further stated that plot No. 2935 was also contiguous to plot No. 2944.

3.1) The further case of the plaintiffs is that the municipal authority duly sanctioned the construction plan on 23.3.1963 in the name of plaintiff No. 1. The plaintiffs constructed pucca house in the year 1961, and started living in the house and continue to do so.

3.2) The further case of the plaintiffs is that after death of Mohammad Alam and Sah Alam, Mahmood Alam and Sk. Md. Najir Alam asserted their claims over plot No. 2943. For the purpose of settling the dispute for ever, both executed registered sale-deed on 6.9.1983 with regard to the aforesaid land. The plaintiffs have been coming in peaceful possession over the entire land of plot Nos. 2938, 2942, 2935, 2943 and 2939 and the plaintiffs have thus perfected their title by purchasing the land and adverse possession. The defendants are full brothers and they have purchased plot No. 2944 in the year 1955. By taking some portion of plot No. 2942, the defendants constructed a pucca house and they were living therein.

3.3) It is further stated that the defendants later on separated and Jafir Mian, defendant No. 1, felt difficulties in his accommodation in the aforesaid house. They are the relations of the plaintiffs and, therefore, the defendants requested the plaintiffs to give north portion of his house on rent to defendant No. 1. The defendants had intended to construct the first floor of his house on plot No. 2944, and would thereafter vacate the house of the plaintiffs. Therefore, the plaintiffs let out the northern portion of their house at the rate of Rs. 50/- per month orally due to relationship and out of affection between the parties. The defendants had promised to vacate the house within one year.

3.4) The further case of the plaintiffs is that defendant No. 1 paid rent till December 1987, and in lieu thereof the plaintiff granted receipt on plain paper, but defendant No. 1 stopped making payment of rent from January 1988 in spite of repeated demands. On account of the relationship between the parties, the plaintiffs did not coerce the defendants, but the plaintiffs bona fide require the suit, premises for their own use and occupation.

4. The defendants in their written statement denied the title of the plaintiffs to the suit premises. There is no relationship of landlord and tenant. The plaintiffs have got no concern with the suit land rather the defendants are in possession of the same, having their residential house on plot Nos. 2942, 2943 and 2944. The defendants have further stated that some mischief has been done in the sketch map filed on behalf of the plaintiffs and forgery has been committed by the plaintiffs in the map. The plaintiffs never constructed the said house and they never came in possession over the suit premises, The plaintiffs have wrongly stated that they purchased lands of plot No. 2943 from Md. Alam and Sah alam on 6.9 1983. These two persons are full brothers of plaintiff Nos. 2 and SALA of plaintiff No. 1. They have created collusive documents. Najir Mian predeceased his father and hence his son did not get share, and the sons and daughter of Md Alam did not inherit in plot Nos. 2942, 2943 and 2944.

4.1) The further case of the defendants is that Ajahar Alam inherited the entire property on the death of his father Suffer Ali, who was married to Bibi Shakira, PHUPHI of the defendants. The plaintiffs have wrongly stated that plot Nos. 2935 and 2938 are in their possession. It is further stated that the plaintiffs never came in possession of the northern portion of plot No. 2843 measuring 4 dhoors which was purchased by defendant on 9.2.1955 by a registered sale-deed from Ajahar Alam with entire plot No. 2944. The name of the defendants are mentioned in the northern boundary of plot No. 2943 purchased by plaintiff No. 2 (Bibi Tahira). The defendants constructed their house on plot No. 2944 area 11 dhoors, and on 4 dhoors of plot No. 2943 (extreme northern) and some portion of plot No. 2942, situate in between plot Nos. 2943 and 2944.

5. On the pleadings of the parties, the learned trial court framed the following issues for adjudication:

- (i) Is the suit as framed maintainable in its present form?
- (ii) Have plaintiffs got any cause of action and right to sue ?
- (iii) Is the suit barred by the principles of acquiescence, estoppel and limitation ?
- (iv) Whether the defendants are tenant as alleged by the plaintiffs of the suit premises at the rate of Rs. 50/- per month ?
- (v) Whether the premises in question has been constructed by the defendants and they are the owner of the same or whether they are the tenant of the plaintiffs of the suit premises which have been constructed by the plaintiffs as part of the entire building ?
- (vi) Whether the defendants are liable to pay arrear of rent as claimed by the plaintiffs ?
- (vii) Are the plaintiffs entitled to get any relief or reliefs?

6. The parties examined their witnesses, brought on record documentary evidence, and adduced oral evidence. The learned trial court held that the plaintiffs are the owners of the suit premises and they have constructed the suit premises, and the defendants are tenants of the plaintiffs of the suit premises. The learned Sub-Judge-IV also held that the defendants an defaulter, and also decided other issues in favour of the plaintiffs and decreed the suit by the aforesaid judgment and decree dated 26th September), 1995.

7. The defendants (appellants herein) felt aggrieved by the judgment of the learned trial court, and preferred the appeal. The learned court of appeal below, formulated the following questions for consideration and adjudication of the case:

- (i) The learned Sub-Judge has wrongly held in deciding issue Nos. 4, 5 and 6 that the plaintiffs are the owner of the suit premises and they have constructed the suit premises and there is relationship of landlord and tenant between the plaintiffs and defendants.

(ii) The learned Sub-Judge has erred in law in declaring the title of the plaintiffs and deciding the suit in favour of the plaintiffs whereas intriguing question of title is involved in the suit and in the eviction suit without paying advalorem court fee title suit should not have been decided.

On a detailed consideration of the matter, the learned court of appeal below dismissed the appeal. He has found that there was relationship of landlord and tenant between the parties. The defendants were defaulter and has incidentally examined and held that the plaintiffs have the title and are the owners of the suit properties. Hence this appeal at the instance of the defendants.

8. While assailing the validity of the impugned judgment learned Counsel for the defendants (appellants herein) has submitted that reception of Ext. "D" as a piece of substantive evidence was in violation of the provisions of Sections 64 and 65 of the Evidence Act. In other words, in his submission, the primary evidence has not been brought on record, and Ext. "D", which is secondary evidence, has also not been proved in the manner prescribed by the provisions of Sections 64 and 65 of the Evidence Act. He next submitted that the learned court of appeal below has failed to appreciate that Mansoor Alam (plaintiff No. 1), who deposed as P.W. 17, has specifically admitted in his deposition that Najir Alain has pre-deceased his father. On the death of Suffer Ali, the entire property was inherited by his son, Ajahar Alam. Therefore, no property pass on to Ajahar Alam, son of Nazir Alam. Secondly, no property went either to Shah Alam or Mohammad Alam. He next submitted that the finding that relationship of landlord and tenant existed between the parties, is perverse. He lastly submitted that the plaintiffs instituted the suit for eviction, and tried to establish his title which was beyond the frame of the suit. The learned trial court has gone into the depth of the matter and has decided the question of title without ensuring payment of advalorem court fee. He relies on the following reported judgments:

(i) Deepak Kumar Verma and Others Vs. Ram Swarup Singh ;

(ii) 1999 (2) P.L.J.R. 148 (Maheshwar Prasad Sharma v Shobha Devi);

(iii) Raghubar Dayal Prasad Vs. Ramekbal Sah, ;

(iv) Akshay Lal Sah and Others Vs. Ayodhya Prasad Sah and Others, .

9. Learned Counsel for the plaintiffs (respondents) has supported the impugned judgment. He submits that the issues are concluded by concurrent findings of facts. He relies on the following reported judgments:

(i) AIR 1959 S.C. 57 (Deity Pattabhiramaswamy v. S. Hanymayya and Ors.);

(ii) Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others, .

He next submits that Ext. "D" is a photo copy of the document and, therefore, inadmissible in evidence. He relies on the judgment, reported in Smt. Manorama Srivastava and Another Vs. Smt. Saroj Srivastava, . He next submits that the learned trial court had gone into the question of title because the defendants had

disputed the plaintiffs' title to the property and, therefore, the matter was gone into incidentally which is permissible in law. He relies on the judgment reported in *Ram Narain Prasad and Another Vs. Atul Chander Mitra and Others*, . He lastly submits that no substantial question of law arises for the consideration of this Court in second appellate jurisdiction.

10. I have perused the materials on record and considered the submissions of learned Counsel for the parties. I shall first, of all deal with the contention advanced on behalf of the defendants (appellants) that the learned trial court has unwittingly converted an eviction suit into a title suit without proper frame of the suit and without payment of advalorem court-fee. It appears to me that the trial court did go into the question of title because the defendants had challenged the title of the plaintiffs to the suit property, were never inducted as tenants, and were in occupation of the suit property in their own right. Learned Counsel for the defendants took me through the paragraphs in the judgment of the learned trial court only to establish his contention that the trial court had extensively gone into the question of titles. Counsel has not at all placed reliance on the impugned judgment. The correct position is that the question was raised on behalf of the defendants before the learned court of appeal below also who discussed this issue in paragraph 39 of the impugned judgment. He has rightly held that the question of title can incidentally be gone into by the court concerned to consider the grant of the dominant relief of eviction. Even if the learned Counsel for the defendants before me were correct in his submission that the trial court may have discussed the question of title a little more than needed, but then the learned court of appeal below is the last court of facts, and has considered and applied his independent mind to all issues of law and facts. He has accordingly considered the issue in the right perspective and has rightly come to the conclusion that, in an eviction suit, the court can consider the question of title incidentally. It had become essential in the present suit because the defendants had set up title adverse to the plaintiffs. In fact, the learned Counsel for the defendants has not found fault with the discussion in the impugned judgment and relied only on the discussion in the judgment of the trial court, little realising that the judgment of the trial court merged into the impugned judgment. The judgment of the Supreme Court in *Ram Narain Prasad v. Atul Chander Mitra* (Supra) is relevant in the present context, Paragraphs 7 to 9 of which are reproduced here in below:

7. Section 7 of the Court Fees Act, 1870, sets out how court fees are to be computed upon certain suits. By reason thereof, on a suit between a landlord and tenant for the recovery of immovable property from the tenant court fees are to be paid "according to the amount of the rent of the immovable property to which the suit refers, payable for the year next before the date of presenting the plaint.

8. In *Sathappa Chettiar v. Ramanathan Chettiar* this Court noted that the question of court fees had to be considered in the light of the allegations made in the plaint and its decision could not be influenced either by the pleas in the

written statement or by the final decision of the suit on the merits. Though this was stated upon a concession, we have no doubt that the statement lays down the law correctly. For the purposes of valuation of the suit for determination of the court fees payable thereon, what is relevant is the plaint. The averments made and relief sought in the plaint determines the character of the suit for the purposes of the court fees payable thereon. What is stated in the written statement is not material in this regard. This view has also been taken by many High Courts.

9. The plaint in this case sought the relief of eviction of the first respondent from the suit property upon the averments that the appellants were the landlords and the first respondent was their tenant and he was in arrears of rent. The suit could only be valued as an eviction suit, regardless of the fact that the first respondent had denied the appellants title to the suit property so that this became an issue in the suit.

11. The issues are concluded by concurrent findings of facts which bind this Court in second appellate jurisdiction. Both the courts below have concurrently found that the relationship of landlord and tenant existed between the parties and the defendants defaulted in payment of rent. It has further been concurrently found that the property belongs to Ajahar Alam, and not Suffer Ali, and that Ext. "D", being photo copy, was inadmissible in evidence. The judgment of the Supreme Court in *D. Pattabhiramaswamy v. S. Hanymayya* (Supra), is relevant in the present context, paragraph 13 of which is set out here in below for the facility of quick reference:

13. The finding on the title was arrived at by the learned District Judge not on the basis of any document of title but on a consideration of relevant documentary and oral evidence adduced by the parties. The learned Judge therefore, in our opinion, clearly exceeded his jurisdiction in setting aside the said finding. The provisions of Section 100 are clear and unambiguous. As early as 1891, the Judicial Committee in *Durga Chowdhry v. Jawahir Singh*, 17 Ind. App. 122 (PC), stated thus:

There is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, however gross the error may seem to be.

The principle laid down in this decision has been followed in innumerable cases by the Privy Council as well as by different High Courts in this country. Again the Judicial Committee in *Midnapur Zarrindari Co. Ltd. v. Uma Charan* 29 Cal. WN 131 : AIR 923 PC 187, further elucidated the principle by pointing out:

If the question to be decided is one of fact it does not involve an issue of law merely because documents which are not instruments of title or otherwise the direct foundation of rights but are merely historical documents, have to be construed.

Nor does the fact that the finding of the first appellate Court is based upon some

documentary evidence make it any the less a finding of fact (See AIR 1930 91 (Privy Council) . But, notwithstanding such clear & authoritative pronouncements on the scope of the provisions of Section 100, Civil Procedure Code, some learned Judges of the High Courts are disposing of Second Appeals as if they were first appeals. This introduces, apart from the fact that the High Court assumes & exercises a jurisdiction which it does not possess, a gambling element in the litigation & confusion in the mind of the litigant public. This case affords a typical illustration of such interference by a judge of the High Court in excess of his jurisdiction u/s 100, Civil Procedure Code. We have , therefore, no alternative but to set aside the decree of the High Court on the simple ground that the learned Judge of the High Court had no jurisdiction to interfere in second appeal with the findings of fact given by the first appellate Court based upon an appreciation of the relevant evidence. In the result, the decree of the High Court is set aside and the appeal is allowed with costs throughout.

11.1 The Supreme Court has held to the same effect in its judgment in the case of Kondiba Dagadu Kadam v. Savitribai Sopan Gujar (Supra), paragraph 5 of which is reproduced here in below:

5. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate Court. It is true that the lower appellate Court should not ordinarily reject witnesses accepted by the trial Court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate Court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate Court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court, cannot substitute its opinion for the opinion of the first appellate court unless it is found that the conclusions drawn by the lower appellate Court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the apex Court, or was based upon inadmissible evidence or arrived at without evidence.

12. No question of law, much-less a substantial question of law, seems to arise in this appeal for the consideration of this Court. Questions which can be treated to be substantial questions of law in second appellate jurisdiction have been illumined by the Supreme Court in various judgments. It has been held as follows in Kondiba Dagadu Kadam v. Savitribai Sopan Gujar (Supra):

6. If the question of law termed as substantial question stands already decided by a larger bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court, its merely wrong application on facts of the case would not be termed to be a substantial question of law. Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that

question as substantial question of law in second appeal. The mere appreciation of the facts, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law. But where it is found that the first appellate Court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as substantial question of law. Where the first appellate Court, is shown to have exercised its discretion in a judicial manner, it cannot, be termed to be an error either of law or of procedure requiring interference in second appeal. This Court in *Labh Singh and Others Vs. State of Punjab*, held that whether trial Court should not have exercised its jurisdiction differently is not a question of law justifying interference.

13. The appeal is dismissed with costs throughout.