
(2007) 10 AHC CK 0105
In the Allahabad High Court

Mohd. Rafeeq

APPELLANT

Vs

Shanti Swaroop Suri and Another

RESPONDENT

Date of Decision : 08-10-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27(aa)

Citation : (2008) 1 AWC 561

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Tarun Agarwala, J.—The plaintiff Shanti Swarup Suri purchased a property No. G-1 situate at Tauria Jeewan Shah, Fort Zone, Cantonment, Civil Lines, Jhansi from one Abdul Rashid vide a registered sale deed dated 25.1.1972 and since then, is in possession through its tenants. The plaintiff alleged that the defendant No. 2, Noor Mohammad Shah had no right, title or interest in the property in question and illegally executed a sale deed dated 9.1.1985 in favour of defendant No. 1, Mohd. Rafeeq. The plaintiff further alleged that the sale deed so executed by the defendant No. 2, in favour of defendant No. 1, was wholly illegal and was also made without any consideration and was therefore null and void. The plaintiff, therefore, filed the suit praying for a declaration that he should be declared the owner of the property in question and in possession through its tenants and that the sale deed dated 9.1.1985 executed by defendant No. 2 in favour of defendant No. 1 be declared null and void.

2. The defendant No. 1, Mohammad Rafeeq contested the suit alleging that Abdul Rasid was not the owner of the property in question and had no right, title or interest to sell the property in favour of the plaintiff. The defendant urged that the Abdul Rasid was a vagabond and was implicated in several criminal cases. The defendant however admitted that the father of Abdul Rasid was the sajjada nasin, i.e., the Manager and was only entrusted to manage the property, and had no right to transfer the title of the deity namely, Dargah Jeewan Shah to any

other person. The defendant contended that Abdul Gani Shah was the original owner and had executed a registered Will dated 30.8.1964 stating therein that upon his death, a committee would consider whether his son, Abdul Hamid Shah was competent to inherit and manage the property, and if the committee found that his son was competent, in that case, he would be appointed as the sajjada nasin of the property. If the Committee felt that he was not competent, then the committee would appoint a sajjada nasin from amongst the persons mentioned in the Will. The defendant alleged that after the death of Abdul Hamid Shah, in 1971, the defendant No. 2 became the manager and had validly executed the sale deed in favour of defendant No. 1 and was in possession. The defendant alleged that the plaintiff was never in possession of the property in question.

3. The defendant No. 2 Noor Mohammad Shah did not appear before the trial court and the suit proceeded ex parte against him. The said defendant did not file any written statement.

4. On the basis of the pleadings of the parties, various issues were framed. The trial court, after considering the evidence, and after considering the pleadings dismissed the suit. The trial court held that the plaintiff could not prove that Abdul Rashid was the owner nor could it prove that he had the authority to execute the sale deed and that the receipts issued by the Cantonment Board or the tax assessments made by the Nagarpalika in favour of the plaintiff was not sufficient to prove his ownership of the property in question. The trial court also found that the defence taken by the defendant that the property belonged to the deity namely, Dargah Jeevan Shah was incorrect. The trial court held that the defendant No. 1 had not filed any evidence to show that the ownership of the property was that of the Dargah. Further, the sale deed of 1985 executed in favour of defendant No. 1 by defendant No. 2 did not indicate that the defendant No. 2 had executed the sale deed as the Sajjada Nasin of the property or that the property belonged to the Dargah Jeewan Shah. The trial court found that the defendant No. 2 had allegedly sold the property in favour of defendant No. 1 in his personal capacity. The trial court found that upon the death of Abdul Gani Shah, Abdul Hamid Shah was validly appoint as the sajjada nasin and upon his appointment, the terms and conditions, as contained in the Will, came to an end. Consequently, the question of appointment of defendant No. 2 upon the death of Abdul Hamid in 1971 did not arise nor any occasion arose for the defendant No. 2 to be appointed as the sajjada nasin. The trial court gave a categorical finding that the defendant No. 2 was never appointed as the manager of the dargah nor was the owner of the property by way of inheritance or otherwise and therefore, had no right to execute the sale deed in favour of defendant No. 1. In view of the aforesaid findings, the suit of the plaintiff was dismissed.

5. Aggrieved, the plaintiff filed an appeal and during its pendency moved an application under Order XLI. Rule 27. C.P.C. seeking permission to file additional evidence to prove his title on the property in question. The lower appellate court allowed the application on payment of cost and permitted the defendant to file

the documents if any. in rebuttal. The lower appellate court also permitted the parties to lead additional evidence. The lower appellate court, after considering the entire material, set aside the judgment of the trial court and decreed the suit holding that the plaintiff was the owner of the property in question and was in possession through his tenant and that, upon the death of Abdul Hamid Shah, the rightful successor was his son Abdul Rashid and that the defendant No. 2, being the brother of Abdul Hamid Shah had no right title or interest in the property nor was he appointed as the Manager of the property. Further, the property did not belong to dargah Jeewan Shah. The lower appellate court further found that the receipts issued by the tenant in favour of the plaintiff coupled with the tax assessment orders issued by the Nagarpalika and the receipts issued by the Cantonment Board was sufficient proof to hold that the plaintiff was the owner.

6. Aggrieved by the decree of the suit, the defendant No. 1 filed the present second appeal, which was admitted on the following substantial questions of law, namely,

(i) Whether the appellate court was justified in allowing the appeal without reversing the findings of the trial court?

(ii) Whether the appellate court was Justified in accepting the additional evidence which was against the provisions of Order XLI. Rule 27, C.P.C.?

At the time of hearing of the second appeal, the learned Counsel for the defendant-appellant submitted that the following question of law also arises for consideration, which should be considered by the second appellate court, namely,

(iii) "Whether the Judge, Small Cause Court had the jurisdiction to hear or decide the first appeal?

7. Heard Sri K. K. Dubey. the learned Counsel for the defendant-appellant and Sri O. P. Lohia, the learned Counsel for the plaintiff opposite party.

8. The learned Counsel for the appellant submitted that the lower appellate court had decreed the suit without reversing the specific findings given by the trial court. Consequently, the judgment of the lower appellate court stands vitiated. 1 have perused the judgment of the trial court as well as of the lower appellate court. In my opinion, the contention of the learned Counsel for the appellant is bereft of merit. The lower appellate court, after considering the evidence that was brought on the record, found that the plaintiff had proved his title and ownership of the land in question and that Abdul Rashid had the right and authority to transfer the land in question in favour of the plaintiff. The lower appellate court has validly arrived at the aforesaid findings and had reversed the findings of the trial court. Consequently, the first substantial question of law, as framed aforesaid, is answered accordingly.

9. The learned Counsel for the appellant submitted that the lower appellate court committed a manifest error in allowing the application under Order XLI, Rule 27.

C.P.C. and in permitting the plaintiff to lead the additional evidence and that the lower appellate court had not recorded any reasons while allowing the application nor provided any opportunity to the defendant. Further, the application was allowed in violation of the mandatory provision of Order XLI, Rule 27, C.P.C.

10. Having given my considerable thought in the matter and upon perusing the record of the lower appellate court. I find that the submission of the learned Counsel for the appellant is patently erroneous and bereft of merit. By an order dated 16.5.90, the lower appellate court allowed the application of the plaintiff permitting him to file additional evidence. In the application the plaintiff had alleged that the documents had been misplaced and only recently it could be traced out. These documents are the receipts issued by the tenant in favour of the plaintiff. The trial court recorded its reasons for allowing the additional evidence holding that the documents are necessary for complete adjudication of the case and that it should also be allowed in the interest of justice and consequently, allowed the application under Order XLI, Rule 27. C.P.C. on payment of cost. The lower appellate court also permitted the defendant to file such document in rebuttal. By another order of the lower appellate court dated 1.8.90, the Court permitted the parties to lead evidence in order to prove the documents. On the basis of the aforesaid orders, it is clear that the lower appellate court recorded its reasons and found that these documents were necessary to do complete justice between the parties. Further cost was imposed upon the plaintiff. Before the second appellate court, the defendant had nowhere alleged that the cost had not been received by him. The record suggests that the cost was duly paid to the defendant. Consequently, it is no longer open to the defendant to challenge the order allowing the application for additional evidence. Even otherwise, in the opinion of the Court, the lower appellate court rightly allowed the application and the provisions of Order XLI, Rule 27 (aa) of the CPC was squarely applicable. The contention that the provisions of Order XLI, Rule 27. C.P.C. was not complied is patently erroneous. The contention of the appellant that the provisions are mandatory is also patently erroneous.

11. In *K. Venkataramiah v. A. Seetharama Reddy and Ors.* 1963 ALJ 903 the Supreme Court held that the provisions of Order XLI, Rule 27 (2) is not mandatory and even if the Court fails to record the reasons while allowing the additional evidence, such admission is not vitiated. The Supreme Court held:

It is true that the word "shall" is used in Rule 27 (2) ; but that by itself does not make it mandatory and therefore the omission of the High Court to record reasons for allowing additional evidence does not vitiate such admission. (Para 10) nor this omission justifies the conclusion that the High Court acted mechanically in the matter without applying its mind to the requirements of the Rule (Para 11).

And again held:

There may well be cases where even though the Court finds that it is able to

pronounce Judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence "to enable it to pronounce judgment", it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Such a case will be one for allowing additional evidence "for any other substantial cause" under Rule 27 (1) (b) of the Code.

12. In *Tarlok Singh Vs. Municipal Corporation of Amritsar and Another*, the Supreme Court held as under:

In an appropriate case whenever the District Judge feels satisfied he may give an opportunity to the parties to lead evidence as it will be open to the District Judge to apply the procedure as far as it can be made applicable in the facts and circumstances of each case.

And further held:

In our view, therefore, what High Court said, appears to be proper as the High Court stated in the impugned judgment that if the District Judge so feels, he may allow any additional evidence to be led under Order XLI Rule 27 of the Code of Civil Procedure. In fact, it would be enough to say that in an appropriate case whenever the District Judge feels satisfied he may give an opportunity to the parties to lead evidence as it will be open to the District Judge to apply the procedure as far as it can be made applicable in the facts and circumstances of each case. We, therefore, see no substance in this appeal. It is, therefore, dismissed. In the circumstances, no order as to costs.

13. In *Yudhishter Vs. Ashok Kumar*, the Supreme Court held:

We are therefore, clearly of the opinion that in the facts and circumstances of a particular case, the appellate authority has Jurisdiction under the Act in question to admit additional evidence. We are further of the opinion that in this case admission of such additional evidence was warranted by the facts and the pleadings in this case. We are satisfied that by such admission of evidence no prejudice has been caused to the appellant.

14. In *A. P. State Wakf Board, Hyderabad v. All India Shia Conference (Branch), A.P. and Ors.* AIR 2000 SC 1751 the Supreme Court held:

We are of the view that instead of dismissing the suit, the justice of the case requires that the parties dare to be given an opportunity to produce evidence so as to enable this Court to render a satisfactory Judgment on the issue.

This Court observed that under Order XLI, Rule 27 (1) (b) of the C.P.C., whenever Court felt difficulty in deciding an issue, the Court could direct additional evidence to be adduced, treating the need for evidence as requirement of the Court for pronouncing a satisfactory judgment. It would be "other substantial cause" in Order XLI, Rule 27 (1) (b).

It is well to remember that the appellate court has the power to allow additional

evidence not only if it require such evidence "to enable it to pronounce judgment" but also for "any other substantial cause", there may well be cases where even though the Court finds that it requires additional evidence "to enable it to pronounce judgment", it still considers that in the interest of justice something which can pronounce its judgment in a more satisfactory manner. Such a case will be one for allowing additional evidence "for any other substantial cause" under Rule 27 (1) (b) of the Code.

15. In view of the aforesaid, pronouncement of the Supreme Court, this Court is of the opinion, that the lower appellate court was justified in accepting the additional evidence which was not against the provisions of Order XLI, Rule 27, C.P.C. The substantial question of law is decided accordingly.

16. The learned Counsel for the appellant next contended that the lower appellate court had no jurisdiction to hear or decide the appeal. The learned Counsel submitted that the Judge, Small Cause Court had no jurisdiction to hear or decide the first appeal. In support of his submission the learned Counsel placed reliance upon a decision of the Supreme Court in Harshad Chiman Lal Modi Vs. DLF Universal and Another, in which it was held that a Court which had no jurisdiction in the subject-matter of the suit, the order passed therein was invalid and therefore contended that the order passed by the lower appellate court was without jurisdiction and a nullity.

17. In my opinion, the appellant cannot be permitted to raise this ground at the stage of the hearing of the appeal. No such ground was raised by the appellant before the lower appellate court nor such ground is mentioned in the memo of appeal before the second appellate court. A point of jurisdiction can be raised at any stage, but it does not mean that the point of jurisdiction can be argued for the first time by a counsel at the stage of the hearing of the appeal without having it raised in the memo of appeal.

18. In my opinion, such an argument cannot be permitted to be raised which had not been raised in the memo of appeal. Further, no attempt was made by the appellant to file an amendment application for amending the memo of appeal. Consequently, this Court is of the opinion, that the submission made by the learned Counsel for the appellant cannot be considered at this stage. Even otherwise, from a perusal of the judgment it is clear that the lower appellate court had passed the order in its capacity as a Civil Judge and not as a Court of Judge, Small Cause Court. The suit was decided by the Munsif against which the first appeal was preferred before the District Judge, who by an order transferred the matter to the Civil Judge, who was also holding the post of Judge, Small Cause Court. Section 3 of the Bengal and Asam Civil Court Act, 1887 contemplates four categories of Court and one such category is the Court of Civil Judge. Section 21 of the said Act provides that appeals from a Munsif lies to a District Judge. Section 22 contemplates that a District Judge may transfer any appeal before it to any Civil Judge. Further, Section 24, C.P.C. gives a power to the District Judge to transfer any appeal to any Court subordinate to it and

competent to try or dispose of the same.

19. In view of the aforesaid, this Court is of the opinion, that the District Judge was competent to transfer the appeal to the Civil Judge for its disposal. The mere fact that the Civil Judge was also holding the post of Judge, Small Cause Court is immaterial and has no bearing with the case. The submission of the learned Counsel for the appellant is bereft of merit and is rejected. The question of law so urged by him is answered accordingly.

20. In view of the aforesaid, this Court is of the opinion, that there is no merit in the second appeal and is dismissed with costs.