

(2008) 12 AHC CK 0157
In the Allahabad High Court

Mohd.Farooq

APPELLANT

Vs

Zarif Ahmad & Another

RESPONDENT

Date of Decision : 10-12-2008

Acts Referred:

Citation : (2008) 12 AHC CK 0157

Hon'ble Judges : Pankaj Mithal, J

Final Decision : Allowed

Judgement

The dispute in the present appeal is between the two brothers. One of the brothers Mohd. Farooq, the plaintiffappellant had instituted a suit against his other brother Zarif Ahmad, defendantrespondent No.1 and his son Zameer Ahmad, defendantrespondent No.2 for permanent injunction in respect of property described at the foot of the plaint by letters Ka, Kha, Ga, Gha, Cha, Chha having Nagar Panchayat, Behat No. 358 on the allegations that he is the owner in possession of the same for the last 30 to 35 years on which exist his one "pacca" room and trees. The defendantsrespondents contested the suit denying the plaint allegation and alleging that the plaintiff is neither the owner nor is in possession of the same. The land was a vacant land and the defendants have occupied the same since before the abolition of Zamindari and are living therein by constructing a "kachcha" house.

The suit was decreed by the Court of first instance holding that the plaintiff is the owner in possession of plot No. 358 and the land in dispute is part of it. The defendants are owners of plot No. 357 and their house also exists on the said plot. Aggrieved by the judgment, order and decree of the trial Court, the defendants preferred a civil appeal. In the civil appeal three additional issues were framed and ultimately the appeal was allowed and the suit has been dismissed. The appellate Court apart from holding that the disputed land is not identifiable, reversed the findings of the Court of first instance and held that the plaintiff has failed to prove his title or possession on the disputed land and as such is not entitle for any decree for permanent injunction.

Thus the plaintiff has come up in this second appeal challenging the judgment, order and decree of the lower appellate Court.

I have heard Sri A.K. Singh, learned counsel for the plaintiffappellant and Sri Mohd. Arif, counsel for the respondents and with their consent proceeds to decide the appeal finally on merits.

It may be relevant to note that the Court vide order dated 4.3.2008 had framed one of the substantial questions of law involved in the appeal without formally admitting the appeal. The substantial question of law so framed runs as under :

"That certain additional issues were framed by the appellate court and these issues were not remitted to the trial court for recording the finding of fact after recording the evidence of the parties on these additional issues".

The first submission of the learned counsel for the appellant is that the three additional issues framed by the lower appellate Court were required to be remitted to the trial Court for the purpose of adducing evidence and then to record findings thereof, which procedure had not followed by the lower appellate Court and therefore, the the judgment and order of the lower appellate Court stands vitiated under law.

The lower appellate Court had framed the following three additional issues in appeal :

The additional issues 2 and 3 framed by the appellate Court are virtually the same as have been framed by the trial Court as issues No. 1 and 6. Thus, these two issues are common and as such the lower appellate Court was not justified in framing these two additional issues as they have already been framed by the trial Court. Now only additional issue No. 1 alone is the new issue. The said issue is, whether the disputed property on the spot is identifiable or not ?

Learned counsel for the respondents has submitted that as for as this issue is concerned the property was not identifiable as the area or the dimension of its boundaries were not disclosed in the plaint Therefore, the lower appellate Court has rightly returned a finding that it is not identifiable on the spot while allowing the appeal and dismissing the suit. In this connection Order VII Rule 3 C.P.C. is relevant which is reproduced hereinbelow:

"3. Where the subjectmatter of the suit is immovable property. Where the subjectmatter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers."

It provides that the plaint should contain the description of the property which is sufficient to identify it either by giving its boundaries or its numbers as per the settlement or survey record.

In the instant case, the plaint in paragraph two clearly specifies that the disputed

land shown by letters Ka, Kha, Ga, Gha, Cha, Chha in the plaint map is in the form of a "Hata" which is recorded in the Nagar Panchayat, Behat as plot No. 358. Therefore, the disputed land has clearly been described by the number as is appearing in the records which is sufficient enough to identify the land on the spot, inasmuch as the revenue records are not disputed.

Sri Mohd. Arif, learned counsel for the defendantrespondents has urged that there was no land bearing No. 358 in the records of the Nagar Panchyat earlier and it has come to be recorded for the first time in the year 1993. Undisputedly, the entry of plot No. 358 in the revenue records of Nagar Panchayat is continuing since 1994. The suit was instituted in the year 1999 therefore, on the date of the institution of the suit the land in dispute was clearly identifiable on the basis of its number existing in the revenue records. Thus, merely for the reasons that the area of the land or its boundaries have not been disclosed in the plaint, the lower appellate Court was not correct in holding that it is not identifiable.

In this connection it has been urged that the issue can not be decided by the High Court in this appeal and the matter requires remand. The submission is not at all convincing and can not be appreciated under the facts and circumstances of the instant case.

Under section 107 C.P.C. the appellate Court is empowered to frame additional issues and to refer them for trial. It also has the power to determine the case finally. The power to refer the additional issues for trial is not obligatory in every case. Where the evidence is sufficient for determining the additional issues framed, the lower appellate Court is competent to decide the same itself and determine the suit finally. Even the High Court under Section 103 C.P.C. has power to determine an issue if the evidence on record is sufficient provided the same has wrongly been determined by the Courts below in view of the decision on the question of law referred to under Section 100 C.P.C.

In 1999 (3) SCC 161 Ashwin Kumar K. Patel Vs. Upendra J. Patel and others and (2002) 2 SCC 686 P. Purushottam Reddy and another Vs. Pratap Stools Ltd. the Apex Court has deprecated the practice of remanding matters to the Court below specially when the evidence on record is sufficient to decide the same completely. In view of the aforesaid, as the disputed land has been duly described by its new number it cannot be said that it is not identifiable on the spot.

Since it has been found that the lower appellate court had erred in holding that the land in dispute is not identifiable any further finding returned in its basis cannot be maintained in law. Moreover, the Court of first instance on consideration of all evidence on record and for cogent reasons had held that the plaintiffappellant is in possession of the disputed land and is the owner of the same. The entries of the Panchayat records supported the finding of ownership so returned by the first Court in favour of the plaintiffappellant. Thus, the lower appellate Court manifestly erred in law in reversing the same solely on the

ground that the land is not identifiable.

In view of the discussion I hold that in the present set of facts and circumstances there was only one additional new issue which was framed by the lower appellate Court. The decision on the said issue required no further evidence as the land in dispute was clearly identifiable on the spot by the plot number given by the Nagar Panchyat. Accordingly, the appellate Court was not justified even in reversing the finding of ownership and possession of the plaintiffappellant as recorded by the Court of first instance.

The appeal therefore, succeeds and is allowed. The judgment, order and decree of the lower appellate Court passed in Civil Appeal No. 40 of 2004 (Zarif Ahmad and another Vs. Mohd. Farooq) is hereby set aside and that of the Court of first instance passed in Original Suit No. 77 of 1999 (Mohd. Farooq Vs. Zarif Ahmad and another) is restored and affirmed. Parties to bear their own costs.