
(2008) 09 AHC CK 0177
In the Allahabad High Court
Case No : Second Appeal No. 531 of 1998

Mustafa

APPELLANT

Vs

Shiv Ram And Others

RESPONDENT

Date of Decision : 12-09-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 16 Rule 10, Order 26 Rule 10, Order 41 Rule 17(2), 75

Citation : (2008) 09 AHC CK 0177

Hon'ble Judges : Pankaj Mithal, J

Final Decision : Dismissed

Judgement

Pankaj Mithal, J.—The plaintiff Hanuman and others instituted Original Suit No. 46 of 1975 for mandatory injunction against the defendants Mustafa and others for demolition of the constructions existing on the land shown by letters B, C, C1, B2 of the plaint map and to put them in possession over it. During the pendency of the suit Hanuman transferred all his rights in the house and the suit land in favour of plaintiff No. 2, Shiv Ram vide registered sale deed dated 27.2.1978. The said suit was dismissed vide judgment and order dated 3.8.1990. However, the appeal of the plaintiffs was allowed and the suit was decreed by the lower appellate Court on 26.2.1998. It is against the aforesaid judgment, order and decree of the lower appellate Court the defendants have preferred this appeal.

2. The dispute in the suit and now in this appeal is basically with regard to the location of the disputed land and the construction thereon i.e. as to whether the same are part of Abadi plot No. 354 or of 356. Undisputedly, plaintiffs are the owners of Abadi plot No. 354 whereas defendants are the owners of Abadi plot No. 356. The Court of first instance in dismissing the suit held that the land in dispute and the constructions are not situate on Abadi plot No. 354. The lower appellate Court, on the other hand, on the basis of survey report dated 7.9.1987 held the constructions to be on Abadi plot No. 354 and accordingly, after setting aside the judgment and order of the lower Court allowed the appeal decreeing the suit.

3. In this second appeal two points have been argued before me.

4. First, the judgment and order of the lower appellate Court is an ex parte judgment which has been passed without hearing the defendants. The defendants have applied to the District Judge for the transfer of the appeal to some other officer wherein an order of stay was passed on 26.2.1998 but the lower appellate Court ignoring the same, pronounced the operative portion of the judgment on the same very day and the detailed judgment was delivered later on.

5. The appeal before the lower appellate Court was preferred in the year 1990. The order sheet indicates that on 2.8.1996 the parties were directed to make their submissions in writing. However, the defendants did not file any written submission for the next two occasions and got the appeal adjourned. Therefore, on 13.11.1996 a specific order was passed that now the appeal shall not be adjourned. Even then at the behest of the defendants, the appeal was got adjourned on many occasions and finally on 15.1.1998 the Court heard the arguments of the plaintiffs and 19.1.1998 was fixed for the arguments of the defendants. On the said date the appeal was again got adjourned from the side of the defendants and 2.2.1998 was fixed. Even on this adjourned date they got the appeal adjourned but with a specific order that no further time shall be granted. On 9.2.1998 in order to delay the disposal of the appeal the defendants applied for amendment of the written statement which was allowed to avoid further delay and 24.2.1998 was fixed. On 24.2.1998 the arguments of the plaintiffs were heard afresh and since no one turned up to argue in defence 26.2.1998 was fixed for pronouncement of the judgment. The lower appellate Court records that on 26.2.1998 from the side of the defendants an application was moved to allow their Counsel to advance arguments. In the interest of justice, the application was allowed and the defendants were permitted to make their submissions in reply but the Counsel for the defendants refused to argue. He subsequently informed that the defendants have applied for the transfer of the appeal to the District Judge. No order of any stay of the proceedings of the appellate Court till that time or even afterwards was produced or submitted. Accordingly, the lower appellate Court looking to the entire conduct of the defendants pronounced the operative portion of the judgment allowing the appeal followed by a detailed judgment later on. The order sheet reveals that the defendants have been avoiding disposal of the appeal since 1996. During this time, the presiding officers have changed but the defendants were not prepared to make their submissions before any of the presiding officers. Thus, from the aforesaid facts and circumstances and the conduct of the defendants, it is clear that the defendants were avoiding hearing of the appeal unnecessarily and, therefore, the Court was left with no option but to deliver the judgment as the hearing had already taken place on 15.1.1998 and again on 24.2.1998 on which dates the defendants refused to advance arguments in defence. The defendants even before the delivery of the judgment was given an opportunity once again to make the submissions but refused to avail the said opportunity. Thus, the lower

appellate Court who had fixed 26.2.1998 for the delivery of the judgment committed no illegality or impropriety in pronouncing the judgment on the date fixed for the purpose particularly, when no order of any superior Court was produced staying the proceedings of the appeal.

6. A litigant cannot be permitted to hold up the Court indefinitely. The Code of Civil Procedure in Order XLI Rule 17 subclause 2 takes care of such a situation and specifically empowers the appellate Court to proceed and decide the appeal *ex parte* where the respondents fail to appear. Therefore, the lower appellate Court under the facts and circumstances of this case was well within its jurisdiction to pronounce the judgment *ex parte* without hearing the defendants. The defendants are themselves to be blamed for their conduct which lead to an *ex parte* judgment and order against them. Therefore, in my opinion the first submission of the learned Counsel for the defendantappellant is totally devoid of merit and is rejected.

7. The second point argued is that the judgment and order of the lower appellate Court is based upon survey report dated 7.9.1987. The said survey report is vague and incomplete. The defendants have applied to the Court for permitting them to produce the survey report of a private person which was permitted and accordingly, a private survey report of Sri Radha Mohan Asthana paper No. 171 Ga with map 171 Ga dated 7.1.1990 was submitted. This report which supports the defendants has been ignored. In view of the conflicting survey reports it was incumbent upon the lower appellate Court to order for a fresh Survey Commission before decreeing the suit.

8. The record of the lower Court reveals that actually there is only one survey report of the Survey Commission on record which is Paper No. 138Ga with map 139Ga dated 7.9.1987 and an additional report of the Advocate Survey Commissioner paper No. 149Ga. In the said report, the Survey Commissioner had taken two fixed points i.e. a temple and a well for determining the location of the disputed land and the constructions situate thereon. It is thereafter that the identity and location of the disputed land has been determined and found to be on Abadi plot No. 354 of the plaintiff. The said report was confirmed vide order dated 7.1.1989 subject to the evidence of the parties. Code of Civil Procedure in Order XXVI Rule 10 provides that the report of the Commissioner shall be evidence and form part of the record. In *Soni Dinesh Bhai Manilal and others v. Jag jivan Mulchand Chokshi*, AIR 2008 SC 380, the Supreme Court has also laid that the survey report is part of record and is liable to be treated as evidence in suit and such report can only be ignored upon assignment of sufficient reasons. No such reasons have been assigned by any Court below to discard the above report. The Court was not dissatisfied with the aforesaid proceedings of the Commissioner and the determination made by it was found by the lower appellate Court to be correct in view of the accompanying other evidence. Therefore, reliance placed upon this report is perfectly justified.

9. The ancillary submission of the learned Counsel for the defendantappellant is

that the said Survey Commission report is vague and incomplete as it does not describe the location of Abadi plot No. 356 of the defendants. This, in my opinion was not necessary for the reason that the Survey Commissioner was only called upon to determine the location of the disputed land and the constructions thereof which has been determined by the Survey Commissioner. A decision of the Supreme Court reported in 2006 (8) AWC 3132 (SC), Subhaga and others v. Shobha and others, fully endorses the above view taken by me. In this case before the Supreme Court it was observed that the purpose of the Survey Commission is to identify the disputed land. Once this has been done by the survey then there is no occasion to spin a theory that the survey of all adjacent lands ought to be made to find out any encroachment. Therefore, even if the adjoining land of plot No. 356 was not surveyed it would not vitiate the report unless it failed in identifying or locating the disputed land.

10. As far as the so called private survey report dated 7.1.1990 is concerned it is of no value. First of all it has not been submitted by any surveyor which has been recognised by the Court or the person having any expertise or special qualification for the purpose. Secondly, the said report has been submitted without visiting the spot and making any inspection or survey only on the basis of a map which was only a certified copy of a certified copy of a "Khasra" map. The certified copy of this "Khasra" map was adduced in evidence by the plaintiff and a certified copy of this "Khasra" map was issued to the defendant on the basis of which the private survey report was prepared and submitted. Thus, this survey report is not based on the original "Khasra" map. It is a recognised principle of law that a certified copy is given only of the original document and not of a certified copy of any document vide AIR 1957 Raj 89, Suganchand and others v. Balchand and another. Therefore, any report prepared on its basis without any actual survey is inadmissible. Besides, this survey report has been prepared by taking only one fixed point. The location of a piece of land cannot be determined by taking one fixed point. Therefore, it has rightly been discarded.

11. In the last an effort has also been made by raising an argument that the survey report dated 7.9.1987 has not been proved as the Survey Commissioner was not examined. Section 75 C.P.C., provides for the power of the Court to issue commission and the procedure for carrying out commission is provided under Order XXVI. Rule 10 of Order XXVI provides that the Survey Commissioner after making the local inspection shall submit his report in writing duly signed by him which shall be treated as an evidence in the suit. It also provides that where the Court for some reason is dissatisfied with the report of the Commissioner, it may direct for further inquiry. It nowhere puts an obligation to prove the report by examining the Commissioner though, the examination of Commissioner is not totally prohibited. The party desirous to examine the Commissioner in open Court can do so with the leave of the Court. In the instant case, the defendants have not applied for any such leave. Therefore, the said report of the Survey Commission cannot be discarded on the ground that the Commissioner was not examined. This is what has been laid down by a Division Bench of this Court in

AIR 1976 All 121, State of U.P. v. Smt. Ram Sri and others. Further as the said report of the Commissioner was clear and unambiguous which was sufficient to identify and to locate the disputed land, the lower appellate Court rightly placed reliance upon it. The Court was not even reported to be dissatisfied with the same. The location of the disputed land and the constructions were clearly ascertainable from the said report. Therefore, the reliance placed upon JT 2000(7) SC 379, Shreepat j. Rajendra Prasad, is of no value and the submission that a fresh Commission ought to have been issued also have no legs to stand.

12. In view of the above discussion, the submission that the lower appellate Court has committed an error in ignoring the alleged survey report dated 7.1.1990 is of no substance and at the same time the lower appellate Court has not erred in law in placing reliance upon the survey report dated 7.9.1987 which is neither vague nor incomplete.

13. In view of the aforesaid facts and circumstances, the finding on the identity and to claim of the land in dispute is a finding of fact. Accordingly, no substantial question of law arises in this appeal. The appeal as such lacks merit and stands dismissed. Costs upon the parties.