

(1944) 11 AHC CK 0010
In the Allahabad High Court

Nasir Uddin

APPELLANT

Vs

Lala Baboo Lal and Others

RESPONDENT

Date of Decision : 06-11-1944

Acts Referred:

Citation : AIR 1945 All 197 : (1945) 15 AWR 36

Hon'ble Judges : Verma, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Verma, J.—This is an appeal by defendant 1 in a suit brought by the plaintiff, respondent 1 for possession of a plot of land, No. 245, situated in Mohalla Allah Dad, Lohamandi, Agra, for the recovery of a certain sum of money as mesne profits and for a perpetual injunction restraining the defendants from interfering with the plaintiff's possession. Defendant 2 in the suit was the Government of the United Provinces of Agra and Oudh. It has been impleaded as respondent 2 in this appeal. Put briefly, the facts are these : By an instrument dated 14th November 1939, the Government purported to give a case of this plot of land to the appellant. On 19th December 1939, the plaintiff-respondent issued a notice to the appellant informing him that he (the plaintiff) was the owner of the plot in question and that the Government had no right to grant a lease of that plot to the appellant. The plaintiff-respondent sent a notice to the Government also. On 2nd January 1940, the plaintiff-respondent sent a second notice to the appellant. On 2nd February 1940 the Government wrote to the appellant asking him not to make any constructions on the land in question pending further enquiry by the Government. On 22nd February 1940, the Government wrote to the appellant that an enquiry had been held and that it had been found that the plaintiff was the owner of the land and that the lease should be deemed to be cancelled. On 19th March 1940 the plaintiff-respondent sent a third notice to the appellant asking him not to make any constructions on the land in suit. The suit was filed on 28th May 1940. The claim was based on the allegation that the plaintiff was

the owner of the land. Written statements were filed by both the defendants on 12th August 1940. The appellant alleged in his written statement that the land did not belong to the plaintiff, that his lessor the Government was the owner of the land and that the Government had every right to execute the lease in his favour. He also pleaded limitation, acquiescence and estoppel. The Government on the other hand, stated in its written statement that on receipt of a notice dated 19th December 1939 from the plaintiff an enquiry was made and a notice was served on defendant 1 on 3rd February 1940,

informing him not to make any constructions and again on 22nd February 1940 another notice was served on defendant 1 informing him that his lease was cancelled.

It was further stated that the land "was also expunged from Nazul registers," and that "on 8th March 1940 the plaintiff was informed that Nazul laid no claim to the land." It was pleaded that, in view of the facts stated in para. 13 of the written statement and the fact that defendant 1 continued his constructions in spite of notice from the Municipal Board to stop constructions, defendant 1 alone was liable and not the answering defendant. Exemption from costs was claimed. Paragraph 10 of the plaint was in these words:

That defendant 2 had no right or authority to grant any lease or to make any transfer of the said plot of land to defendant 1 and if defendant 2 has as alleged by defendant 1 granted a lease to defendant 1 in respect of the plot of land in suit the lease is absolutely illegal, ineffective, null and void: as against the plaintiff and does not and cannot create any right, title or interest in favour of defendant 1.

The answer of the Government to this paragraph of the plaint was in these words : "The answering defendant takes no objection to para. 10 of the plaint." Upon these pleadings issues were framed and the parties went to trial. The plaintiff produced certain documents in support of his allegation that the title vested in him and had vested in his predecessors-in-title. The appellant also produced such documentary evidence in support of his case as he considered necessary. After several adjournments the suit came up for trial on 23rd July 1941. Evidence was recorded on 23rd and 24th July. Witnesses were examined not only by the plaintiff and defendant 1 but also by defendant 2. Arguments were heard on 30th July 1941, and judgment was pronounced on 26th August 1941. The suit was decreed. The plaintiff was granted a decree for possession and for injunction as prayed and a certain sum was also awarded against the appellant on account of mesne profits. From this decree the present appellant took an appeal to the lower appellate Court. This appeal was filed on 18th October 1941. The case then had a sort of a chequered career in the sense that it was transferred from Court to Court. It also appears that at one stage the appellant made an application to the appellate Court praying that he be allowed to produce additional evidence. This matter occupied the Court for some time and ultimately by an order dated 3rd August 1942, the application was granted.

The plaintiff also was given liberty to produce further evidence if he so desired. The case was remitted to the trial Court with the direction that it should bring on the record the further evidence produced by the parties and send the record back to the appellate Court. The parties accordingly produced some evidence before the trial Court and on 26th September 1942, that Court directed that the record be returned to the appellate Court.

2. Some time after the record had come back to the appellate Court and the case had come before that Court on certain dates in connexion with various matters, an application was filed on 20th November 1942, in the appellate Court on behalf of defendant-respondent 2 the Government-praying that leave be granted to the applicant for amending the written statement which had been filed on its behalf in the suit. The amendment sought to be made was a total reversal of the position that had been taken up by the Government in the trial Court. It was now alleged that a mistake had been committed and that the Government now wanted to plead that the land did really belong to Government and not to the plaintiff. An affidavit sworn by one Ganga Prasad was also filed along with this application. The main allegation was that a mistake had been committed by the Nazul officials when the written statement had been originally filed in the suit, and that the Government now considered that it, and not the plaintiff, was the owner of the land. The appellant also filed an application supporting the prayer made on behalf of the Government that leave be granted to it to amend its written statement in the manner stated above. The plaintiff opposed the application. The matter was argued before the lower appellate Court and ultimately on 12th March 1943, the Court rejected the application for amendment. The Court gave an opportunity to the applicant (the Government) to file a revision against that order and fixed 12th April 1948 for the hearing of the appeal on the merits. On 12th April 1943 it was stated in an application filed by the Assistant Government Pleader on behalf of the Government that no application for revision had been filed as no such application lay and that the Legal Remembrancer had "advised accordingly." The appeal was then heard and was dismissed. The learned Additional District Judge who heard the appeal held in agreement with the trial Court, that the evidence produced by the plaintiff fully established his allegation that he was the owner of the land in suit and that the Government had no title to it. He also held that it was proved by abundant and conclusive evidence that the plaintiff had been in possession at least up to the year 1938 and that the plea of limitation raised by defendant 1 was without substance. The pleas of, acquiescence and estoppel were also rejected on the ground that the plaintiff as well as the Government had done all that could be done to intimate to defendant 1 that the plaintiff claimed to be the owner of the land and that he (defendant 1) should not make any constructions on the land.

3. This second appeal as already stated has been filed not by the Government the alleged owner, whose application for amendment was rejected by the Court below but by defendant 1 and the only question of law that has been raised before me on his behalf is that the lower appellate Court was wrong in rejecting

the application filed on behalf of defendant 2 (the Government) asking for leave to amend its written statement. Learned eloquent and lengthy arguments have been addressed to me and I have been asked to hold that the lower appellate Court was, in the circumstances of this case bound to grant that application and to send the case back to the first Court for fresh trial of the suit in view of the position taken up by the Government in its application for amendment. Reference has been made to Order 6, Rule 17, Civil P.C., and it has been contended that the powers conferred upon the Courts by the Code of 1908 are wider than those conferred by the Code of, 1882. That is a proposition to which no exception can be taken. The question, however, remains whether under the law, as it stands at present, the lower appellate Court was bound to grant the application for amendment. The decision of the lower appellate Court rejecting that application was in my opinion, so obviously correct and just that I do not consider it necessary to deal with the matter in very great detail. Three rulings have been cited in support of the argument. Taking them in their chronological order, the first is a decision of their Lordships of the Privy Council in *Ma Shwe Mya v. Maung Mo Thaung* ('22) 9 AIR 1922 P.C. 249. Reliance has been placed on the following portions of para. 4 of their Lordships' judgment:

All rules of Court are nothing but provisions intended to secure the proper administration of justice and it is therefore essential that they should be made to serve and be subordinate to that purpose so that full powers of amendment must be enjoyed and should always be liberally exercised.

Attention may, however, be drawn to what follows the observations just quoted. Their Lordships observed:

But none the less no power has yet been given to enable one distinct cause of action to be substituted for another nor to change by means of amendment the subject-matter of the suit.

In the case before them their Lordships held that the Judicial Commissioner ought not to have allowed the amendment prayed for by the plaintiff. The next case is that in *L.A. Subramania Iyer Vs. R.H. Hitchcock*, . The observations on which reliance is placed are to be found in the judgment of Reilly J. They are at p. 958, col. 1 of the report. After referring to certain cases on which the appellant's counsel had relied the learned Judge proceeded thus:

Those cases do not go beyond the well recognized principle that, however the necessity to amend may have arisen, leave to amend should always be granted and at any stage in the proceedings in order to allow the real question at issue between the parties to be raised on the pleadings unless the party applying for leave has acted in bad faith or the amendment will cause some injury to the opposite party for which he cannot be fully compensated by costs or otherwise.

Reliance has also been placed on another sentence to be found in col. 2 on the same page:

So far from being slow to grant leave to amend pleadings or from pinning the parties to the strict letter of their pleadings it is the duty of the Court to assist parties in bringing out clearly the real questions in issue between them.

Was the application for amendment filed on behalf of the Government in the case before me of the nature contemplated by the learned Judge in the sentence just quoted, or was it of the nature contemplated by him in the sentences which immediately follow the sentence quoted above:

But when we speak of the real questions in issue or in controversy between the parties we must be careful as to the stage of the proceedings to which we refer. The questions in controversy between the parties which have to be brought out clearly and decided are, save in exceptional cases, the questions in controversy when the parties join issue, that is, when the defendant puts in his written statement. They do not include new questions which the defendant neither wished nor intended then to dispute but which at a later stage in the proceedings either because he has changed his mind or because something has happened after he filed his written statement he thinks it profitable to dispute.

It was held in that case that the amendment prayed for by the defendant had been rightly refused by the Subordinate Judge the decision being thus expressed in the judgment of Reilly J.:

In my opinion therefore the Subordinate Judge was right in refusing to allow him at a later stage to change his front and to put forward by amendment a new case denying publication.

It is hardly necessary to point out that in the case before me defendant 2 was seeking by the amendment to put forward not only a new case, but a case diametrically opposed to the case which had been put forward in the written statement filed in the suit on the basis of which the parties had gone to trial. It may also be stated here that there is, in my opinion, nothing exceptional in the case before me. The third and last case cited is that in AIR 1928 305 (Oudh) The passage relied upon is this:

It should be borne in mind that the rules of procedure have no other aim than to facilitate the task of doing justice. Under Order 6, Rule 17, Civil P.C., all amendments should be allowed at any stage of the proceedings which justify the two conditions : (a) of not working injustice to the other side; and (b) of being necessary for the purpose of determining the real questions in controversy between the parties.

The learned Judges, however, proceeded to observe as follows:

Amendment should be refused of course when the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated, in costs.

I am content to base my conclusion on the latter observation just quoted, on the

observations of Reilly J." printed in column 2 of p. 958 of AIR 1925 Mad. 9502 which is the last of the passages quoted by me above from that judgment, and on the last four lines of the fourth paragraph of the judgment of their Lordships of the Privy Council in 48 I.A. 2141 quoted above. So far as the general principles are concerned, the matter is not in doubt. The only question is whether there is anything in the circumstances of the present case which can justify this Court in holding that the discretion, admittedly vested in the lower appellate Court, was wrongly exercised by it. In my judgment the only answer that can be given to that question is an emphatic No. I have no hesitation, on the facts of this case, in holding not only that the lower appellate Court did not exercise its discretion wrongly, but that the manner in which it did exercise its discretion was the only manner in which that discretion, having regard to law and justice could and should have been exercised. If the Court below had granted the application for amendment it would have passed an unjust and incorrect order.

4. It has been contended that the order rejecting the application filed by defendant-respondent 2 for amendment of its written statement has caused prejudice to the appellant. This argument has been based on the last sentence of the fourth paragraph of the judgment under appeal. The Court below after stating the fact that defendant 2 had applied for leave to amend its written statement and the fact that that application had not been granted made the following remarks:

The result is that the onus of proving that defendant 2 was the owner of the land in suit fell upon defendant 1.

5. It is argued that the trial Court on the pleadings as they stood in that Court was right in thinking that the onus lay on defendant 1, but-it is argued-if the lower appellate Court had granted the application for amendment the onus would have been shifted from the appellant to the plaintiff. This contention, in my opinion, is without force. Defendant 1-the lessee-had already taken the plea that the plaintiff was not the owner of the land in suit and that his lessor-defendant 2-was the owner. It is not explained how an allegation made by the lessor that it was the owner of the land could affect the question of onus. The onus clearly would have remained where it was. The true position clearly was that to begin with the onus lay on the plaintiff to prove his title. The learned Judge of the lower appellate Court recognises this in para. 6 of his judgment where he observes: "The onus of proving his case was of course upon the plaintiff-respondent." Defendant 1 had denied the title of the plaintiff and had asserted the title of his lessor. The mere fact that the lessor also by his written statement supported that denial and that assertion could not alter the position in regard to the onus. The lower appellate Court has examined the evidence and has recorded its finding on the question of title in favour of the plaintiff on the footing that it was for the plaintiff to establish his case. It has of course also held on the evidence that defendant 1 had failed to prove his allegation as to his lessor's title. That, however, does not mean that any undue onus has been laid on the

appellant.

6. No arguments have been addressed to me on the questions of limitation, estoppel and acquiescence. The finding that the plaintiff had been in possession at least up to the year 1958 is a finding of fact based on evidence mostly documentary and cannot be questioned in second appeal. The decision of the Courts below on the questions of acquiescence and estoppel was on the facts clearly correct. As for the rest the question of title is clearly concluded by the finding arrived at by the Courts below on the evidence produced by the parties. That finding is a finding of fact and cannot be challenged in second appeal.

7. The learned standing counsel has stated before me that all that he has to say on behalf of the Government is that the Government should not have been impleaded as a respondent in this appeal and that it is entitled to its costs from the appellant. The appeal fails and is dismissed. The plaintiff is entitled to receive his costs in all the Courts from the appellant. There has been considerable discussion as to whether respondent 2-the Government-should be allowed its costs. Although I am not inclined to agree with the contention of the learned standing counsel that the appellant was wrong in impleading the Government as a respondent to this appeal, I see no good reason for deviating from the general rule that the costs should follow the event. The appeal having failed both the respondents who had to appear are in my opinion entitled to their costs. It cannot be said that it was wrong on the part of the Government to put in an appearance in this Court. It is also obvious that the interests of the two respondents are not the same. Accordingly I direct that respondent 2 will. also receive its costs of this appeal from the appellant. Leave to appeal under the Letters Patent is refused.