

(2006) 04 AHC CK 0249
In the Allahabad High Court
Case No : Second Appeal No. 666 of 2005

Ram Shanker Shukla (deceased) and Others	APPELLANT
Vs	
Ganesh Sewa Ashram Sanstha	RESPONDENT

Date of Decision : 04-04-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, 100

Citation : (2006) 3 AWC 3050

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Advocate : M.D. Singh "Shekhar", for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

Prakash Krishna, J.—This second appeal is on behalf of heirs and legal representatives of Shri Ram Shanker who died during the pendency of appeal in the court below and was a defendant in Suit No. 323 of 1998 instituted by the sole respondent for mandatory injunction and damages directing the defendant to vacate the accommodation in his possession and to pay the damages for use and occupation of the premises in question.

2. The facts which are now not in dispute is that Ram Shanker Shukla, the defendant was employed as a manager by the plaintiff and in the course of employment the defendant was given possession of certain accommodation. The defendant retired on 30.6.1994, but has failed to vacate the accommodation which was given to him as part of his employment. According to the plaintiff on 21.5.1997, the defendant illegally trespassed over another hall towards East situate on the second floor of the building of plaintiff.

3. Suit No. 323 of 1998 was instituted claiming relief of mandatory injunction for direction to the defendant to remove his possession and hand over the vacant possession to the plaintiff and also to pay damages for the unauthorized use and occupation of the accommodation in question for the period commencing from

the date of retirement, i.e., 30.6.1994 till the delivery of the possession.

4. The suit was contested on a number of pleas and almost all those pleas have been found against the defendant and as they were not reagitated before this Court, it is not necessary to notice them in detail.

5. The suit has been decreed by both the courts below and feeling aggrieved the present appeal has been filed.

6. Although in the memo of appeal number of questions of law have been proposed but Shri M. D. Singh, advocate, has submitted only the following two legal propositions for the admission of the appeal:

(1) The suit for mandatory injunction was not maintainable and the plaintiff should have brought a suit for possession.

(2) No damages could be awarded against the defendant as the damages can be awarded under Order XX, Rule 12, C.P.C. in respect of the suit for possession only.

7. I have given careful consideration to the aforesaid submissions of the learned Counsel for the appellant. It is not in dispute that the defendant was employed as a manager by the plaintiff which is a registered society. According to the plaintiff, accommodation as described in the plaint was given to the defendant as part of employment and the said employment having come to an end on 30.6.1994 on account of retirement of the defendant, the defendant was under a legal and moral obligation to vacate the accommodation immediately thereafter. These facts are not in dispute except according to the defendant he could not be retired on 30.6.1994 as his date of birth was wrongly recorded in the service book. However, this was not found favour by the courts below and was not reagitated before this Court. In other words, after the retirement of the defendant on 30.6.1994, the permission given by the plaintiff to occupy the accommodation in question has come to an end. In spite of that the defendant continued to remain in occupation. The plaintiff gave notice dated 13.5.1994, informing the defendant that he is going to retire on 30.6.1994 and should vacate the accommodation immediately thereafter. Subsequent to it, other notices dated 27.10.1994 and 19.6.1995, were given asking the defendant to vacate the premises. There was difficulty of service of notice on account of its refusal by the defendant. Ultimately, the suit giving rise to the present appeal was instituted 15.4.1998. On the basis of these facts the learned Counsel submitted that the suit for mandatory injunction is not maintainable as it was not brought with promptitude and there was delay in filing the present suit. Elaborating the argument he submitted that on the facts of the present case, the remedy, if any, of the plaintiff was to file a suit for possession of the disputed accommodation after seeking ejectment of the defendant. Strong reliance has been placed by him on a Apex Court judgment, Krothapalli Satyanarayana Vs. Koganti Ramaiah and Others, in support of above plea, wherein the Apex Court refused to grant the relief of mandatory injunction to remove wall which

amounted unauthorized encroachment over the plaintiffs property. The facts of that case discloses that the wall in question was constructed in the year 1956 and the suit for mandatory injunction was instituted in 1965. The Apex Court found that both the appellate court and High Court have concurrently held that the plaintiff was guilty of acquiescence as the wall was constructed to his knowledge in 1956. On these facts situation the relief for mandatory injunction was denied.

8. Coming to the facts of the present case it may be noted here that plea of acquiescence or any such plea of the like nature has not been pleaded or raised either in the written statement or in the courts below. Even there is no whisper in the entire written statement with regard to the plea of acquiescence. Before the trial court this plea was also not pressed as is apparent from the Judgment. Twelve issues were framed by the trial court. None of the Issues touched plea of acquiescence even remotely. On the contrary, it is clear that the plaintiffs were pressing hard the defendant to remove his possession from the disputed accommodation. The Intention of the plaintiff to get the property vacated is very much evident from the notices given by them from time to time. In this facts situation, it is not possible to say that the plaintiffs acquiesced the possession of the defendant.

9. Coming to the legal proposition as urged by the appellant with regard to the non-maintainability of suit for mandatory injunction, it is clear that the said controversy has been set at rest by the Apex Court in the case of Sant Lal Jain Vs. Avtar Singh, It has been held therein that a licensee must be deemed to be always a licensee. It is not open to him, during the subsistence of licence or in the suit for recovery of possession of the property instituted after the revocation of licence to set up title of the property in himself or anyone else. It is duty of licensee to surrender possession of the property as soon as the licence comes to an end. In para 7 of the report it has been observed that it is for the licensee to show that the suit was filed after considerable delay which will disentitle the licensor to the discretionary relief. The Apex Court has further observed that even if there was some delay, attempt should be made to avoid multiplicity of suits and the licensor should not be driven to file another round of suit with all the attendant delay, trouble and expense. "The suit is in effect one for possession though couched in the form a suit for mandatory injunction as what would be given to the plaintiff in case he succeeds is possession of property to which he may be found to be entitled", as observed by the Apex Court therein. Ultimately, it found:

Therefore, we are of the opinion that appellant should not be denied relief merely because he had couched the plaint in the form a suit for mandatory injunction.

10. The above dictum has been followed and reiterated in a recent judgment by the. Apex Court in the case of Joseph Severance and Others Vs. Benny Mathew and Others, . On the facts of the present case there is no unreasonable delay in filing the suit. Successive registered notice demanding the vacant possession was

sent to the defendant. The suit was filed when the defendant failed to vacate the disputed accommodation. Plea of acquiescence or delay on the part of the plaintiff in not instituting the suit at the earliest opportunity is essentially a question of fact which needs pleading and evidence. No such question was raised before the courts below and the defendant cannot be permitted to raise a factual controversy not pleaded in the written statement for the first in second appeal. Apart from it, on the facts of the present case, it is not possible to hold that there was unreasonable delay to disentitle the plaintiff to get the relief claimed for. The ratio of Apex Court in the case of Joseph Severance and others (supra) is fully applicable to the facts of the present case.

11. The facts of the case of Krothapalli (supra) are distinguishable and the principle laid down therein cannot be applied to the facts situation as exists in the case in hand. The relief was denied therein basically by invoking the principle of acquiescence and the inaction on the part of the plaintiff to seek redressal for a long period of time.

12. I do not find any substance in the second point urged by the appellant. The status of a licensee, after termination of the licence is that of a trespasser. The Apex Court in the case of Joseph Severance and others (supra) has held that suit for mandatory injunction is in effect one for possession though couched in form of a suit for mandatory Injunction. This gives the complete answer to the argument of the appellant's counsel. In addition thereto, the plaintiff is a registered society and there is absolutely no material on record to show for any justification on the part of the defendant to remain in possession after his retirement, i.e., 30.6.1994. The defendant has enjoyed the property and is liable to pay the damages at the rate decreed by courts below. Quantum of damages was not disputed in the present appeal.

13. A perusal of Section 100 of the Code of Civil Produce makes it clear that High Court cannot proceed to hear second appeal without formulating substantial question of law involved in the appeal. The Apex Court in the case of Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., , has explained the meaning of phrase "substantial question of law". It has been held that a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial", a question of law must be debatable, not previously settled by law of the land or a binding precedent and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a Just and proper decision of the case. It has been further held that question of law raised for the first time before the High Court is not question involved in the case "unless it goes to the root of the matter".

14. The aforesaid principles of law has been reiterated by the Apex Court in the

recent judgment in Govindaraju Vs. Mariamman,

15. In view of above, no substantial questions of law is involved in the appeal. The appeal is dismissed summarily. No order as to costs.