

(1983) 04 AHC CK 0064
In the Allahabad High Court
Case No : Ex. Second Appeal No. 411 of 1975

Ramji Seth

APPELLANT

Vs

Smt. Zohra Kaimi

RESPONDENT

Date of Decision : 04-04-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144

Citation : (1983) 04 AHC CK 0064

Hon'ble Judges : O.P. Saxena, J

Bench : Single Bench

Advocate : R.S. Verma, for the Appellant; R.N. Singh, for the Respondent

Final Decision : Dismissed

Judgement

O.P. Saxena, J.—This is a second appeal against the order dated 23-11-1974 passed by the learned Second Additional District Judge, Azamgarh.

2. The brief facts giving rise to this appeal are that the Respondent filed O. S. No. 525 of 1960 against the Appellant and another for a declaration that the sale deed executed by the Custodian in favour of the Appellant is null and void and the disputed property is wakf property. Possession was also prayed for. The suit was dismissed by the trial court on 19-12-1964. Civil Appeal No. 121 of 1966 was filed by the Respondent and the same was allowed on 19-8-1966. The judgment and decree passed by the trial court were set aside and the suit for declaration and possession was decreed against the Appellant and another. The Appellant filed Second Appeal No. 162 of 1967 on 1-11-1968. The second appeal was partly allowed and the judgment and decree passed by the lower appellate court were modified to the extent that the suit for declaration of land was decreed and the decree for possession was set aside. The Respondent had obtained possession over the property in pursuance of the decree passed by the lower appellate court and after the decision of the second appeal, the Appellant applied for restitution. The application was allowed by the trial court. The Respondent preferred Misc. Appeal No. 80 of 1974 and the same was decided by

the learned Second Addl. District Judge by the impugned order. The appeal was allowed and the order passed by the learned Munsif was set aside. Hence, this second appeal.

3. I have heard the learned Counsel for the parties and have gone through the record. I am unable to agree with the finding of the lower appellate court that the decision of the second appeal did not amount to reversal of the decree for possession granted by the lower appellate court in Civil Appeal No. 121 of 1966. I hold that the order passed by the Hon"ble Court in Second Appeal did amount to reversal of the decree for possession.

4. The main question that has been urged before me is that even though the decree passed by the lower appellate court in Civil Appeal No. 121 of 1966 may have been reversed by the High Court in Second Appeal No. 162 of 1967, the Appellant is not entitled to restitution of possession as he is a trespasser.

Section 144 CPC provides as below:

144. Application for restitution-(2) Where and in so far as a decree or an order varied or reversed in any appeal, revision or other proceedings or is set aside or modified in any suit instituted for the purpose, the Court which passed the decree or order shall, on the application of any party entitled to any benefit by way of restitution or otherwise cause such restitution to be made as well, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified; and for this purpose the Court may make any orders including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits which are properly consequential on such variation, reversal, setting aside or modification of the decree or order.

This section obviously consists of two parts. The first part has been satisfied in this case inasmuch as the decree for possession was reversed by the High Court. The second part is more important. Restitution can be granted on the application of any party entitled to any benefit by way of restitution. It is to be determined by the court granting restitution that the party who has given the application is entitled to the benefit of restitution. The learned Counsel for the Respondent rightly submitted that such an inference can not be drawn in favour of a person who is a mere trespasser. The lower appellate court as well as High Court held that the sale deed in favour of the Appellant is null and void and no rights were conferred on him by virtue of the same. In view of this positive finding the Appellant is a mere trespasser and he does not fulfill the second condition of Section 144 Code of Civil Procedure.

5. Reliance may be placed on the case of AIR 1941 128 (Privy Council) . It was held that where the persons who have been dispossessed are found to be trespassers and persons in subsequent possession are lawfully in possession by virtue of a valid lease in their favour, it is not necessary for the ends of justice that the trespasser should be restored to possession though they may succeed in

a suit for possession. This case was followed in the case of Mahadeo Prosad Shaw Vs. Calcutta Dyeing and Cleaning Co., .

6. I am unable to accept the contention of the learned Counsel for the Appellant that refusing restitution would amount to nullifying the judgment and the decree passed by the High Court in second appeal. The judgment of the Hon"ble Court shows that the High Court did not deem it proper to confirm the decree for possession as the Respondent was merely a beneficiary and she could not claim possession during the life time of the sons of Mohiuddin. This position remains undisturbed. Sons of Mohiuddin can sue her for possession. The question which is being decided in this second appeal is as to whether the Appellant is entitled to restitution inspite of the fact that he is a trespasser. By refusing restitution on this ground this Court is not recording any finding inconsistent with the finding recorded in the second appeal.

7. I, therefore, conclude that the learned Second Addl. District Judge rightly held that the Appellant is not entitled to restitution.

8. The second appeal is dismissed.

9. In the peculiar circumstances of this case the costs shall be easy.