

(1998) 02 RAJ CK 0002
In the Rajasthan High Court
Case No : Civil Second Appeal No. 3 of 1991

Surja Ram

APPELLANT

Vs

Shri Krishan Lal

RESPONDENT

Date of Decision : 18-02-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Evidence Act, 1872 — Section 1, 56, 57

Citation : (1998) 1 RLW 623 : (1998) 2 WLC 558 : (1998) 1 WLN 164

Hon'ble Judges : Arun Madan, J

Bench : Single Bench

Judgement

Arun Madan, J.—This appeal arises out of the judgment and decree dated 1.12.1990 passed by learned Addl. District Judge No. 1. Sri Ganganagar whereby the lower Appellate Court affirmed the order and decree dated 21.8.1982 passed by Munsiff-cum-Judicial Magistrate. Sri Ganganagar in Civil Suit No. 142/1977.

2. The facts giving rise to the filling of this appeal briefly stated, are that the plaintiff respondent filed a suit for permanent injunction against the defendant appellant before Munsiff-cum-Judicial Magistrate, Sri Ganganagar for restraining the defendant-appellant from raising a wall on a piece of land in respect of Room No. 9 situated on Plot No. 628 alleged to be rented out to the defendant on a monthly rent of Rs. 12/-. In the said suit the plaintiff had also sought a relief of mandatory injunction for demolition of the wall already constructed by the defendant. It was further alleged in the plaint that the aforesaid Plot No. 628 belonged to him and was in his ownership by virtue of duly executed sale-deed dated 26.2.1958 on which he had constructed 9 rooms and out of which he had rented out Room No. 9 to the defendant.

3. The suit was contested by the defendant wherein he had also disputed the relationship of landlord and the tenant between the parties and it was further alleged by the defendant that the Municipal Council, Sri Ganganagar was the owner of the disputed house and\\as such the plaintiff had no locus-standi to file

the suit.

4. On the pleadings of the parties the trial Court framed the following issues

1. Whether Plot No. 628 on which residential house was constructed in Sri Ganganagar wherein a wall had been raised from North to South stood in the owner-ship of the plaintiff?

2. Whether the construction of the wall was raised by the defendant over the plot in question was done in violation of buildings bye-laws and whether the plaintiff is authorized to get the wall demolished so unlawfully raised?

3. To what relief is that plaintiff entitled?

5. The plaintiff in support of his case besides examining himself had also examined two witnesses before the trial court. While the defendant had examined himself and also four witnesses in support of his claim. The trial court after hearing the parties decreed the plaintiffs suit vide its judgment and decree dated 21.8.1982 and granted relief of permanent injunction to the plaintiff restraining the defendant from raising construction of disputed wall and further restrained the defendant by way of mandatory injunction from demolishing the construction of the wall already raised. Being aggrieved by the judgment and decree, dated 21.8.1982 passed by Munsiff-cum-Judicial Magistrate. Sri Ganganagar the defendant preferred an appeal before the District Judge, Sri Ganganagar which was transferred to the Court of Addl. District Judge No. 1. Sri Ganganagar for hearing and disposal in accordance with law. Meanwhile the defendant has also applied to the Municipal Council, Sri Ganganagar on 20.10.1983 for issuance of Patta to him in respect of disputed plot and in consequence thereof a Patta was issued by the Municipal Council in favour of the, defendant on 5.2.1985 on payment of Rs. 1584/- as consideration money. After the receipt of Patta. the defendant applied for amendment of his written-statement and also applied for permission to lead additional evidence under Order 41 Rule 27, C.P.C. However, both the said applications were dismissed by the lower Appellate Court vide its order dated 14.2.1989.

6. It will also be pertinent to mention that after the rejection of his aforesaid applications by the lower Appellate Court, the defendant had also filed an application under Order 18 Rule 10 CPC on 5.5.1989 alongwith another application under Sections, 56 and 57 of the Indian Evidence Act read with Section 151 CPC on the same day which too were rejected by the lower Appellate Court vide its order dated 1.12.1990. After hearing main appeal, learned Addl. District Judge No. 1 dismissed the same vide his order dated 1.12.1990 affirming the judgment and decree of the Trial Court, dated 21.8.1982 against which the present second appeal was preferred to this Court and which is now being disposed of finally by this judgment.

7. In the memo of this appeal the appellant has urged inter-alia:

(a) that the learned lower Appellate Court has erred in law in not considering the

lease-deeds dated 5.2.1985 and 30.3.1988 which were issued by the Municipal Council, Sri Ganganagar in favour of defendant-appellant and the plaintiff-respondent, respectively. Since the said document had come into existence only after the disposal of the suit and filing of the appeal before the lower Appellate Court, the same could not be produced earlier by the appellant before the Courts below.

(b) that the aforesaid lease-deeds clearly show that the disputed premises were in the ownership of the Municipal Council, Sri. Ganganagar and hence the plaintiff has no title, interest etc. over the disputed land inasmuch as, the lease-deed dated 30.3.1988 shows that the suit premises were not covered by the patta which was issued in favour of the plaintiff.

(c) that the lower Appellate Court has erred in not taking the aforesaid documents on the record since they were relevant for determining the real controversy between the parties.

(d) that the plaintiff had no locus-standi to file the suit as he had no right, title or interest over the disputed land.

8. This Court after perusing the grounds urged in the memo of appeal as well as the judgments rendered by the Courts below admitted this appeal for hearing on 11.3.1993 and framed the following substantial question of law:

Whether the lower Appellate Court had erred in law in rejecting the application for amendment of the written statement under Order 6 Rule 17 CPC and consequently declined the prayer of the appellant to lead additional evidence in respect of the plea that the disputed land infact, belonged to the Municipality and not to the plaintiff, and if so to what effect?

9. It will also be pertinent to mention that simultaneously the plaintiff-respondent had also filed another suit bearing No. 48/1978 on 4.2.1978 before the Munsiff-cum-Judicial Magistrate, Sri Ganganagar against the appellant as regards the same disputed Plot No. 628 on the following grounds:

(a) default in payment of rent.

(b) denial of title of the plaintiff.

(c) Nuisance and

(d) material alteration.

10. The Trial Court decreed the above suit in favour of the plaintiff vide its judgment and decree dated 21.8.1982. i.e., on the same day on which the aforesaid First Suit No. 142/1977 (under appeal vide S.B. Civil Second Appeal No. 3/1991) between the same parties was decreed by the Trial Court.

11. Aggrieved by the judgment & decree dated 21.8.1982 passed by the Munsiff & Judicial Magistrate, Sri Ganganagar in Civil Original Suit No. 142/1977, the respondent (defendant-appellant herein) had preferred a First Appeal being No.

6/1982 before the Additional District Judge No. 1, Sri Ganganagar which came to be dismissed by the said Appellate Court vide order dated 3.3.1990 on the ground of time barred. Against the said order, the defendant-appellant preferred a second appeal before this Court bearing S.B. Civil Second Appeal No. 34/1990 which came to be allowed by the learned Single Judge of this Court vide order dated 9.12.1992 and the case was remanded back to the Trial Court for fresh adjudication in accordance with law. It will not be out of context to mention here that in the meanwhile, the defendant-appellant Surjaram had applied for issuance of "Patta" as regards the same land bearing No. 682 and the Municipal Council had issued the "Patta" on 30.3.1988 in respect of remaining part of the land in favour of the plaintiff-respondent; Krishan Lal.

12. In pursuance of the aforesaid order of remand of proceedings to the Additional District Judge No. 1, Sri. Ganganagar, the matter was adjudicated by the said Appellate Court after giving due hearing to the parties and the appeal preferred by the appellant was dismissed in terms of the order dated 3.9.1993. Thereafter, a second appeal was preferred to this Court vide S.B. Civil Regular Second Appeal No. 179/1993 which came to be heard and decided by the learned Single Judge of this Court vide its Judgment dated 22.8.1997.

13. On the pleadings of the parties, the learned Single Judge of this Court at Principal Seat at Jodhpur had framed the following substantial questions of law while disposing of the appeal finally on merits:

(1) Whether Trial Court erred in not affording any opportunity of leading evidence to the appellant defendant whose defence against eviction was struck off?

(2) Whether Courts below erred in not allowing defendant appellant to lead evidence to prove that he was not tenant in the premises but he himself lawfully held the property on the basis of patta issued by the Municipal Council, Sri Ganganagar?

14. The aforesaid appeal was allowed by the learned Single Judge of this Court and the matter was remanded back to the Trial Court with the following observations:

From the proceedings, therefore, it is obvious that neither plaintiff's evidence was declared over not defendant's defence was held to be closed by the Trial Court. In such a situation, defendant under the impression that he was not being allowed to lead evidence because his defence has been struck off, did not move any application for being allowed to lead evidence it cannot be said be such a fault that he should be visited with a penalty of suffering an illegal deprivation of his right to lead evidence in his defence. The first appellant Court did not consider this aspect of the case at all probably under the impression ***** because defence was struck off, ***** had no right to lead evidence.***** Court obviously erred in nor fixing the case for defendant's evidence and this is such a mistake which goes to the root of the case and results in miscarriage of justice.

For the aforesaid reason, judgment and decree of the Trial Court and first appellate Court cannot be sustained. The suit will have to be sent back to the Trial Court for proceeding from the stage of plaintiff's evidence. The judgment and decree of the lower Courts are set aside allowing this appeal. The suit is remanded to the Trial Court for taking the remaining evidence of plaintiff and evidence of defence on all other issues other than the defence against ground u/s 1(1)(a) of the Act. Since the case is being remanded back, there is no point in deciding the application under Order 41 Rule 27 C.P.C. moved before this Court. The parties are given liberty to submit any additional documentary and oral evidence, if they desire to submit before the Trial Court. The Trial Court shall also entertain the application for amendment of the pleadings if any amendments are necessitated because of subsequent events or if the amendments are considered to be necessary for the fair and final disposal of the suit by the Trial Court.

15. Learned Counsel for the appellant has very strenuously canvassed that it was alleged against the defendant-appellant by the plaintiff-respondent in the suit for permanent injunction that the defendant without obtaining the permission of the landlord-plaintiff had constructed a wall from North to South over the disputed land on Plot No. 628 situated in Block No. 4 in Purani Abadi, Sri Ganganagar and the relief of mandatory injunction had also been sought for from the Trial Court for removing the said plot. The suit came to be finally decreed in plaintiffs favour vide judgment dated 21.8.1982. The appeal was preferred against the said order of decree before the District Judge Sri Ganganagar and it is during the pendency of the appeal that an application dated 24.7.1985 was filed by the defendant-appellant under order 41 Rule 27, CPC for permission to lead additional evidence by way of production of lease-deed which was issued by the Municipal Council in favour of the appellant as regards the disputed land and reliance was placed on a "patta" dated 5.2.1985 by the Municipal Council in view of the fact that the said Patta was executed only on 5.2.1985 after the closure of the defendant's evidence by the Trial Court on 11.3.1980. hence the defendant-appellant was prevented by the sufficient cause from not having produced the Patta in question for the perusal of the Trial Court and in support of his case. On 14.4.1988, the plaintiff-respondent had also filed an application under Order 10 Rules 1 & 2 CPC contending inter-alia that since without the knowledge of the plaintiff the said Patta was issued and since he had already filed a suit for cancellation of the said Patta in the Court of Munsiff Sri Ganganagar and since the suit was pending adjudication since 2.4.1988, he had prayed that the defendant-appellant may be examined under Order 10 Rule 1 CPC. In this context, it will be relevant to mention the provisions of Order 10 Rules 1 & 2 which, runs as under:

Order 10 Rules 1 & 2.

Examination of Parties by the Court

Ascertainment whether allegations in pleadings are admitted or denied.

1. At the first hearing of the suit the Court shall ascertain from each party or his

pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

Oral examination of party, or companion of party.

2. (1) At the first hearing of the suit, the

(a) shall, with a view to elucidating matters in controversy in the suit, examine orally such of the parties to the suit appearing in person or present in Court, as it deems fit, and

(b) may orally examine any person, able to answer any material question relating to the suit, by whom any party appearing in person or present in Court or his pleader is accompanied.

(2) At any subsequent hearing, the Court may orally examine any party appearing in person or present in Court, or any person, able to answer any material question relating to the suit, by whom such party or his pleader is accompanied.

(3) The Court may, if it thinks fit, put in the course of an examination under the rule questions suggested by either party.

16. It has further been contended in the memo of appeal that on 2.2.1989, the defendant-appellant had filed yet another application before the First Appellate Court on 30.3.1988 by contending that since the Municipal Council Sri Ganganagar had executed a Patta in favour of the plaintiff-respondent, the same be ordered to be produced on record of the Court since the same was relevant for determining the real controversy between the parties.

17. It is surprising to note that notwithstanding the fact that the evidence which was very relevant for determining the controversy between the parties, was suppressed and was not brought to the notice of the Court by production of the above documents and this fact was completely ignored by the First Appellate Court while rejecting the application of the defendant-appellant filed under Order 6 Rule 17 CPC vide impugned-order dated 4.2.1989, since the permission sought for by the defendant-appellant for production of the above documents by way of an application under Order 41 Rule 27 CPC and also for permission to record the oral examination of the concerned parties as stipulated under Order 10 Rules 1 & 2 CPC was also rejected by the First Appellate Court giving rise to the present appeal. Thereafter, the defendant-appellant filed another application under Order 18 Rule 10 CPC on 5.5.1989 which stipulates that the Court may, of its own motion or on the application of any party or his pleader, objection to any question, if there appears to be any special reason for so doing, take down any particular question and answer, or any objection to any question, if there appears to be any special reason for so doing. Simultaneously, another application came to be filed by the appellant before the Trial Court with reference to Sections 56

and 57 of the Indian Evidence Act read with Section 151 CPC on 5.5.1989. Notwithstanding the above, the aforesaid applications were rejected by the First Appellate Court vide its impugned judgment & decree dated 1.12.1990.

18. Before dealing with the aforesaid contentions as advanced by the learned Counsel for the parties, I deem it appropriate to refer to the provisions of Order 41 Rule 27 CPC which deals with production of additional evidence in Appellate Court which runs, as under:

27. (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or]

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause.

the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court the Court shall record the reason for its admission.

19. From the persual of the order 41 Rule 27, it is clear that the Legislature has explicitly mandated that the Court from whose decree the appeal has been preferred to the Appellate Court if has refused to admit recording of evidence which ought to have been admitted or the parties seeking to produce such additional evidence establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not be produced at the time when the decree was passed, the said Appellate Court may allow such additional evidence or document to be produced or witnesses to be examined during the pendency of the appeal since if the said evidence is not allowed to be produced on the record, it will vitally prejudice the defence to be raised by the aggrieved party in appeal. In my view, the First Appellate Court has thus obviously committed material irregularity when having declined to entertain the aforesaid applications of the defendant-appellant moved under Order 41 Rule 27 CPC, for amendment of the written-statement sought by the defendant-appellant under Order 6 Rule 17 CPC and the application moved under Order 10 Rules 1 & 2 CPC and thus committed grave illegality in not having taken note of the aforesaid salutary provisions of law and has thus ignored the mandate of the Legislature in not having acted in discharge of its judicial functions in accordance with law.

20. During the course of hearing, learned Counsel for the appellant has placed reliance upon the judgment of this Court reported in 1994 DNJ (Raj.) 532: Gokul Ram v. Hari Ram and Ors.: 1996 WLN (UC) 723 (Raj.): Munnu Khan v. Noor Mohd. and 1995 (1) WLN 242(Raj.) : Niyazuddin v. Jugal Kishore and Ors.

21. In my view, the ratio of the aforesaid decisions are fully attracted and applicable to the facts and circumstances of the instant case. Keeping in view the fact that since the amendments sought for by the defendant-appellant before the Trial Court were not of such a nature as to change the nature of the case nor were otherwise barred under any statutory provisions, in my view, the Trial Court as well as the First Appellate Court in having declined seeking the necessary permission to the appellant to lead additional evidence on his application by declining to entertain is application under Order 41 Rule 27 CPC has committed obvious fallacy and material irregularity in having rejected the said applications giving rise to the filing of the present second appeal before this Court.

22. In support of its contention, learned Counsel for the respondents has also placed reliance upon the judgment of this Court reported in Kashibai and Another Vs. Parwatibai and Others, : Jhangloo and other v. Tularam and Anr. AIR 1986 (MP) 3 and Additional District Magistrate (City) Agra Vs. Prabhakar Chaturvedi and Another, . I have examined the ratio of the aforesaid judgments and in my view the ratio of the aforesaid judgments and in my view the ratio of the aforesaid judgment are distinguishable and not attracted and applicable to the facts and circumstances of the present case.

23. In my view, the impugned judgment & decree dated 1.12.1990 as well as the order dated 4.2.1989 passed by the Additional District & Sessions Judge No. 1, Sri Ganganagar affirming the judgment & decree dated 21.8.1982 decreeing the plaintiffs Suit No. 142/1997 deserves to be set-aside as being not maintainable in law and consequently, the said impugned-judgment & decree dated 1.12.1990 and order dated 4.2.1989 passed by ADJ No. 1, Sri Ganganagar in Civil Appeal No. 3/1982 are quashed and set-aside.

24. As a result, the appeal is remanded back to the Trial Court with a direction to the said Court to expeditiously deal with and decide the same in accordance with law after giving due opportunity of hearing to the parties of leading their evidence.

25. As a result of above discussion, the defendant-appellant is given opportunity to lead all additional evidence which he could not able to lead in view of having been deprived of his right to lead the same as staled above. It is further directed that the appeal shall be heard alongwith appeal giving rise to the filing of S.B. Civil Second Appeal No. 179/1993 which was decided by the learned Single Judge at Principal Seat (Jodhpur) vide order dated 22.8.1997 by which, said Court had remanded the pending suit to be sent back to the Trial Court for proceedings from the stage of plaintiffs evidence and had further quashed and set-aside the judgment & decree of the Courts below. It is further directed that

the parties are given opportunity to submit any additional oral or documentary evidence which they may desire to submit before the Trial Court with a further direction to the Trial Court to entertain the applications for amendment of the pleadings if such amendments necessitate in view of subsequent events or if the amendments are considered to be necessary for the fair and impartial trial and final disposal of the suit in accordance with law. The parties are directed to appear before the Trial Court on 23.3.1998. The summoned record be transmitted to the Courts below immediately so that the Trial Court shall dispose of the pending suit expeditiously preferably by the end of September, 1998.