
(1970) 12 RAJ CK 0005

In the Rajasthan High Court

Case No : Civil Second Appeal No. 435 of 1964

The Municipal Board

APPELLANT

Vs

Nand Lal and Another

RESPONDENT

Date of Decision : 15-12-1970

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33

Citation : (1970) WLN 735

Hon'ble Judges : C.M. Lodha, J

Bench : Single Bench

Final Decision : Allowed

Judgement

C.M. Lodha, J.—The suit out of which this second appeal by the defendant No. 1 Municipal Board, Shri Madhopur arises was instituted by the respondent No. 1 Nandlal in the Court of Civil Judge, Neem-Ka-Thana for recovery of Rs. 2000/- as damages on account of the alleged illegal demolition of the walls constructed by the plaintiff on the land in dispute measuring 47' x 22' situated in the town of Shri Madhopur. The plaintiff's case as set out in the plaint was that he had been in possession of the land and had constructed the walls on it with the permission of the Municipal Board, Shri Madhopur. It was the Chairman of the said Board out of malice got the plaintiff's walls demolished by force on 20.7.1958. It was, therefore,, prayed that a decree for Rs. 2000/- as damages for illegal and wrongful demolition of the plaintiff's walls be awarded both against the Municipal Board as well as Jagdish Prasad, the then Chairman of the Board.

2. Jagdish Prasad did not appear to contest the suit and was therefore proceeded against ex parte. The Municipal Board, however, resisted the plaintiff's walls had not been demolished illegally, and that in any case if the Chairman Jagdish Prasad had done the same illegally, the Municipal Board was not liable for any such act of Jagdish Prasad done without its authority.

3. After recording the evidence produced by the parties the learned Civil Judge

dismissed the plaintiff's suit by his judgment and decree dated 31.10.1962. The plaintiff filed appeal in the Court of District Judge, Jhunjhunu who by his judgment dated 8.4.1964 set aside the judgment and decree by the trial court and granted a decree for Rs. 1000/- in favour of the plaintiff against both the defendants on account of damages for demolition of the plaintiff's walls. Consequently, the defendant No. 1 Municipal Board, Shri Mad-dhopur has come in second appeal to this Court and the respondent-plaintiff Nandlal has also filed cross-objection under Order 41, Rule 22 Civil P.C. with a prayer for increasing the decretal amount to Rs. 2000/- as prayed in the plaint.

4. Learned counsel for the appellant has urged that the learned District Judge has completely missed the main point in the case, namely, whether the demolition of the walls carried out by the defendants was illegal? His submission is that unless the plaintiff was successful in proving that the demolition of the walls was illegal and unauthorised, the plaintiff was not entitled to get any damages. Learned counsel for the plaintiff-respondent has however submitted that the appellant Board is not entitled to raise this objection in as much as no such plea had been taken by the Board in the written statement nor the case had been developed in the trial court on this ground. The counsel for the respondent No. 2 Jagdish Prasad has supported the stand taken by the learned counsel for the appellant and has further argued that the decree passed against his client may also be set aside by virtue of the powers vested in this Court under Order 41, Rule 33 Civil P.C. even though Jagdish Prasad has not filed any appeal or cross-objection against the decree passed against him by the lower appellate court.

5. It may be observed that in para No. 2 of the plaint the plaintiff has alleged that the walls in question had been demolished illegally and without authority. The Board denied this allegation in its written statement and an issue was also framed on the question whether the demolition had been carried out illegally with a view to cause wrongful loss to the plaintiff? This is issue No. 2. The trial court while deciding this issue held that the plaintiff had failed to prove that the demolition had been carried out by the defendant illegally or with a view to cause wrongful loss to the plaintiff. But in the course of discussion of the evidence led by the parties in respect of this issue the trial court also found that the plaintiff was not justified in constructing the walls in question. The learned District Judge also concentrated his full attention on the question whether the walls had been constructed by the plaintiff with the Board's permission, and he held that since the Board had not raised the plea that the allotment of the land to the plaintiff was illegal and so also permission for construction of the walls granted by the Chairman, it recorded a finding in favour of the plaintiff on this point. Learned counsel for the parties after a protracted argument had to admit that the allotment of the land in question was made by the Board to the plaintiff in the month of November 1956 and that even though the allotment was subsequently set aside in pursuance of the order of the Additional Commissioner, Ajmer Division, Ajmer dated 15.6.1957, it was subsequently restored by the Municipal

Board, Shri Madhopur itself when a suit was instituted by the plaintiff in this respect. This is what emerges from an application filed on behalf of the Board by its Chairman dated 17.2.1959 in the Court of Civil Judge, Neem-ka-Thana in that suit (vide Ex. 11 page C/64/5). It further appears that the allotment having been made initially in favour of the plaintiff the latter deposited not only the price of the land but also permission fee for raising construction on the same (vide Ex. 13, page C/55/15). Thus apart from the fact that the defendant has not specifically taken any objection as to the validity of the allotment of the land in favour of the plaintiff and as to the permission for constructing walls thereon, there is sufficient material on the record for coming to the conclusion that at the time the plaintiff raised the walls in dispute on the land, there existed an order of allotment of the same in his favour by the Board as well as permission for raising construction on it. That this was so, is further borne out by the statement of P.W. 3 Shivilal, Secretary of the Board. I am, therefore, in agreement with the learned District Judge that there is nothing on the record on the basis of which it can be said that the walls in question had been constructed by the plaintiff illegally or without authority.

6. The important question, however, is whether the demolition of the walls carried out by the Board or for the matter of that by the Chairman was illegal? I do not find much substance in the contention if the learned counsel for the plaintiff respondent that the appellant is not entitled to raise this point. This point, according to me, was very much in issue & the parties were alive to it and the learned Distt. Judge has also addressed himself to this aspect of the case. But the finding arrived at by him in this respect is, as I shall presently show, open to serious challenge. Having found that the allotment of the land in favour of the plaintiff and the construction made by him thereon were not unauthorised, he has at once come to the conclusion that the demolition of the plaintiff's walls was not legal and was thus made with the intention of causing wrongful loss to the plaintiff. He appears to have completely missed the events which took place between the construction of the walls and the demolition of the same by the Board. It is not denied even by the learned counsel for the respondent-plaintiff that the allotment as well as permission for construction granted by the Board were set aside by the Additional Commissioner, Ajmer Division, Ajmer by his order dated 15.6.1957. After this order had been passed by the Additional Commissioner it appears that the Board took up the matter in its meeting held on 23.9.1958 and passed a resolution in the plaintiff's favour and to grant a "Patta" of the same (Vide Ex. 11) and that the "Patta" was granted to the plaintiff on 26.2.1959 (Ex. 2) These relevant facts go to show that at the time when the demolition was carried out rightly or wrongly the order of allotment in plaintiff's favour stood revoked by the order of the Additional Commissioner, Ajmer Division, Ajmer dated 15.6.1957 and the direction given by the Additional Commissioner was that the land was to be sold by auction. It is not disputed that the order of the Additional Commissioner was binding on the Municipal Board and consequently if the Board with a view to carry out the order of the superior

authority directed demolition of the walls in dispute, it cannot be said that the act of the Board or for the matter of that the act of the Chairman in getting the demolition carried out was illegal or unauthorised. It was the duty of the plaintiff to have taken appropriate steps for stay of the demolition proceedings, but there is nothing on the record to show that he did so.

7. The only argument which the learned counsel for the respondent-plaintiff has advanced in this connection is that since the Board itself had agreed to restore the allotment of the land to the plaintiff vide Ex. 11 and had actually granted the "Patta" for the same (Ex.2) on 26.2.1959 it must be held that the act of demolition of the walls carried out of the defendant in July 1958 was illegal. I am, however, unable to accede to this submission in as much as there is no gain price of the land deposited by the plaintiff Nandlal be refunded to him & he may be directed to vacate the land & in case he fails to do so, land may be cleared by the Board and he re-auctioned (vide Ex.3) A notice was accordingly issued to the plaintiff to comply with the aforesaid resolution of the Board. It appears, however, that the plaintiff was not prepared to withdraw from the land, and consequently the Chairman deputed the staff of the Municipal Board to carry out forcible demolition of the walls Constructed by the plaintiff on the land. Ultimately on 20.7.1958 the staff which had been deputed to demolish the construction made a report to the Chairman that the impugned construction had been demolished and the material had been placed before the Municipal Office. The plaintiff does not appear to have done any thing to get the demolition proceedings stayed either by approaching the higher authority or by invoking the jurisdiction of a Civil Court and all that is submitted on behalf of the plaintiff respondent in this connection is that after the demolition had been carried out the plaintiff instituted a suit to get the allotment of the land in question restored in his favour by the Board. As to what the allegations contained in the suit filed by the plaintiff and what was the relief claimed therein is not known. How the suit was ultimately disposed of is also not known but it is submitted by the learned counsel for the plaintiff-respondent that the Board agreed to restore the allotment of the land in saying the fact that at the time the demolition was carried out it was not illegal or improper and the same could not be deemed to be illegal or improper merely because ultimately in the course of the civil suit instituted by the plaintiff, the Board agreed to restore the allotment of the land in the plaintiff's favour. In this view of the matter there is no escape from the conclusion that the demolition of the walls was neither illegal nor unauthorised and consequently the plaintiff is not entitled to get damages for the same. The decree passed against the Board, therefore, must be set aside.

8. Now it remains to consider whether the decree should be set aside against Jagdish Prasad - defendant No. 2 also who has not filed any appeal or cross-objection from the judgment and decree by the learned District judge? Order 41. Rule 33 C.P.C. provides that the appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and

this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties may not have filed any appeal or objection. It is true that generally a party who wishes to have a decree against him reversed must file an appeal or cross-objection, and ordinarily an appellate court must not vary a decree in favour of a party who has not preferred any, appeal or cross-objection but in exceptional cases the rule enables an appellate court to pass such decree as ought to have passed or as the nature of the case may, require. In the present case the relief for grant of damages has been made against both the defendants on the same allegation that the illegal and unauthorised. The relief is a single one though it has been claimed against more than one defendant, and in view of the conclusion I have come to that the act of demolition was not illegal or unauthorised, it follows that no decree should have been passed against either of the defendants. Thus it appears that as a result of interference with the judgment and decree by the lower appellate court in favour of the appellant Board, a further interference with the same qua the respondent No. 2 Jagdish Prasad is also necessary to do complete justice between the parties and I consider it to be a fit case to exercise the power conferred by Order 41, Rule 33 Civil P.C.

9. Accordingly, I allow this appeal, set aside the judgment and decree by the learned District Judge, Jhunjunu dated 8.4.1964 and dismiss the plaintiff-respondents suit against both the defendants, In the circumstances of the case, however, I leave the parties to bear their own costs throughout.