
(2015) 01 SC CK 0022

In the Supreme Court Of India

Case No : Civil Appeal No. 666 of 2015 (Arising out of S.L.P. (C) No. 8008 of 2009)

Zarif Ahmad and Others

APPELLANT

Vs

Farooq

RESPONDENT

Date of Decision : 27-01-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, Order 41 Rule 23A, Order 41 Rule 24, Order 41 Rule 25, Order 41 Rule 27
Specific Relief Act, 1963 — Section 16, 38, 41

Citation : (2015) 2 AD (SC) 590 : AIR 2015 SC 1236 : (2015) 2 AJR 533 : (2015) 3 ALD 13 : (2015) 3 ALJ 463 : (2015) 110 ALR 239 : (2015) 2 AWC 2052 : (2015) 3 LW 358 : (2015) 1 RCR(Civil) 794 : (2015) 128 RD 144 : (2015) 1 SCALE 690 : (2015) 6 SCJ 53 : (2015) 2 WBLR

Hon'ble Judges : Prafulla C. Pant, J.;Dipak Misra, J.

Bench : Division Bench

Advocate : L.B. Rai and Shankar Divate, for the Appellant; Suryanarayna Singh, AAG, Gaurav Jain, Abha Jain, Jaivir Singh and Pragati Neekhara, Advocates for the Respondent

Final Decision : Allowed

Judgement

Prafulla C. Pant, J.—This appeal is directed against judgment and order dated 10.12.2008 passed by High Court of judicature at Allahabad whereby Second Appeal is allowed and the decree passed by Civil Judge (Junior Division), Haveli, Saharanpur, in Suit No. 77 of 1999, is restored.

2. We have heard learned Counsel for the parties and perused the papers on record.

3. Brief facts of the case are that Plaintiff/Respondent instituted suit (OS No. 77 of 1999) seeking permanent injunction against his brother Defendant/Appellant No. 1 - Zarif Ahmad and nephew Zamir Ahmad (Defendant/Appellant No. 2) to restrain them from interfering in possession of the premises in his occupation. It is pleaded by the Plaintiff that the land shown at the foot of the plaint (Annexure

P-1) with letters Ka, Kha, Ga, Gha, Cha, Chha, which bears Nagar Panchayat plot No. 358 is owned and possessed by him, and the adjoining land shown by letters Gha, Cha, Chha, and Jha bearing Nagar Panchayat plot No. 357 belongs to the Defendants. It is further pleaded that Plaintiff pays house tax of the property No. 358, and Defendants have no concern with it. The Defendants have constructed their house over the land shown by letters Gha, Cha, Chha, and Jha which is towards south of the Plaintiff's land. It is alleged in the plaint that the Defendants have threatened the Plaintiff that they would forcibly take possession of the premises held by him. Consequently, the suit is filed.

4. The Defendants contested the suit, and filed written statement (copy-Annexure P-3) before the trial court. They denied the title and possession of the Plaintiff over land in suit. It is stated in the written statement that the disputed land originally belonged to one Zamindar of town Behat, before abolition of Zamindari. The land in question was vacant piece of land, occupied by Defendant No. 1 who constructed his residence and planted trees over it. He (Defendant No. 1) continued his possession over the land and started paying house tax since 1979 when Town Area of Behat was notified. It is further pleaded by the Defendants that original Khasra number of the plot in question was 734/2/3. It is further pleaded that the Plaintiff has been given share in the house of his father in the ancestral property situated in town Kasban, and he lives with his family there. It is alleged by the Defendants that the Plaintiff got his name entered in the municipal record in connivance with the Chairman and Members of Town Area Committee, Behat, and got the disputed property numbered as 358. It is further pleaded that the suit is bad for mis-joinder of Defendant No. 2. With the above pleadings, the relief claimed by the Plaintiff was opposed by the Defendants.

5. The trial court, on the basis of the pleadings of the parties, framed the following issues:

- (1) Whether the Plaintiff is owner and in possession of the suit property?
- (2) Whether the Defendants are illegally interfering with the peaceful possession of the Plaintiff by cutting the trees, demolishing the structure and forcibly taking possession of the property?
- (3) Whether the suit is barred by the provisions of Sections 38 and 41 of Specific Relief Act?
- (4) Whether the suit is undervalued and court fees paid is insufficient?
- (5) Whether the suit is bad for mis-joinder of Defendant No. 2?
- (6) To what relief, if any, the Plaintiff is entitled?

6. The parties adduced their oral and documentary evidence before the trial court. On behalf of the Plaintiff, PW1-Mohd. Farooq (Plaintiff himself) and PW 2-Idrish were examined. On the other hand, on behalf of the Defendants, DW1-Zarif Ahmad (Defendant No. 1 himself), DW2-Safiq and DW3-Anita (Advocate

Commissioner, who inspected the spot), were examined. It appears that Plaintiff filed, documents to show that in the Assessment Register of the Town Area, plot No. 358 is recorded in his name whereas plot No. 357 is recorded in the name of Defendant No. 1-Zarif Ahmad. He further filed receipts showing payment of house tax in respect of House No. 358 from the year 1993 to 1997, by him. The Defendants appear to have filed paper No. 19C (copy of khatauni), paper No. 20C (copy of khasra), paper Nos. 21C and 22C (copies of receipts of house tax of house No. 357), paper Nos. 23C and 25C (copies of extract of assessment of town area) and paper No. 26C (copy of order for sanctioning of site plan).

7. The trial court, after hearing the parties and discussing the evidence, decided all the issues in favour of the Plaintiff and decreed the suit vide judgment and order dated 30.7.2004 (copy-Annexure P-4). Aggrieved by the said judgment and decree, Defendants filed Civil Appeal No. 40 of 2004 before the District Judge, which was allowed vide judgment and order dated 2.3.2007 (copy-Annexure P-5) by Additional District Judge, Saharanpur. The Plaintiff challenged the judgment of the first Appellate Court before the High Court in Second Appeal. The High Court, after hearing the parties, set-aside the order of the first Appellate Court, and restored the decree passed by the trial court. Hence, by way of special leave, the Defendants have filed the present appeal.

8. Learned Counsel for the Defendants argued before us that the property in suit was not identifiable, and the first Appellate Court committed no error of law in dismissing the suit. However, on perusal of plaint (copy-Annexure P-1), we find that at the end of the plaint, Plaintiff has not only given the boundaries of the plot but also mentioned Nagar Panchayat (Town Area/Municipal) number of the plot. It is also clearly mentioned at the foot of the plaint that the house in question is situated in Mohalla-Sadakpur, Town Behat Nagar Panchayat, Tehsil Khas, District Saharanpur, and in the plaint map, same is shown by letters Ka, Kha, Ga, Gha, Cha, Chha. In our opinion, there is little force in the argument of learned Counsel for the Defendants that the land in suit is not identifiable. Had the land in question been non identifiable, the Advocate Commissioner would not have given the report, relied by the Defendants (copy-Annexure P-2) after inspection of the plot in question.

9. It is contended by the learned Counsel for the Defendants that no length and width of the land in question is mentioned in the plaint. As such, the decree passed by the trial court was liable to be set-aside as the decree could not have been executed.

10. We have considered the submission of learned Counsel for the Defendants but we are unable to agree with it for the reason that had it been a case of mandatory injunction requiring restoration of possession of land to the Plaintiff or demolition of the construction raised by the Defendants, what the Defendants have pleaded before us, could have been accepted but the present suit is for the relief of permanent prohibitory injunction in respect of the land which is described with boundaries and its municipal number. Therefore, it cannot be said

that the decree passed by the trial court is un-executable.

11. Order VII Rule 3 of the Code of Civil Procedure, 1908 (for short "Code of Civil Procedure"), which pertains to the requirement of description of immovable property, reads as under:

Where the subject matter of the suit is immovable property: Where the subject matter of the suit is immovable property, the plaint shall contain a description of the property, sufficient to identify it, and in case such property can be identified by boundaries in a record of settlement or survey, the plaint shall specify such boundaries or numbers.

12. The object of the above provision is that the description of the property must be sufficient to identify it. The property can be identifiable by boundaries, or by number in a public record of settlement or survey. Even by plaint map showing the location of the disputed immovable property, it can be described. Since in the present case, the suit property has been described by the Plaintiff in the plaint not only by the boundaries but also by the municipal number, and by giving its description in the plaint map, from no stretch of imagination, it can be said that the suit property was not identifiable in the present case. In our opinion, the High Court has rightly held that the first Appellate Court has erred in law in dismissing the suit by holding that the land is not identifiable. It appears that the first Appellate Court has wrongly framed the additional issue as to whether the property in dispute is identifiable or not particularly when there was no such plea in the written statement. We are in agreement with the High Court that there was no need on the part of the first Appellate Court to remit the matter to the trial court as contended by the Defendants before it (High Court) to allow the parties to adduce evidence on the additional issue, as neither issue on identifiability of land arises from the pleadings nor the evidence was lacking on record.

13. No doubt, Section 107 of Code of Civil Procedure empowers the appellate court to remand a case, but it simultaneously empowers the appellate court to take additional evidence or to require such evidence to be taken. Rule 24 of Order XLI Code of Civil Procedure provides that where evidence on record is sufficient, appellate court may determine the case finally. It is not a healthy practice to remand a case to trial court unless it is necessary to do so as it makes the parties to wait for the final decision of a case for the period which is avoidable. Only in rare situations, a case should be remanded e.g. when the trial court has disposed of a suit on a preliminary issue without recording evidence and giving its decision on the rest of the issues, but it is not so in the present case.

14. In *P. Purushottam Reddy and Another Vs. Pratap Steels Ltd.*, , this Court has observed in paragraph 11 as under:

11. In the case at hand, the trial court did not dispose of the suit upon a preliminary point. The suit was decided by recording findings on all the issues. By

its appellate judgment under appeal herein, the High Court has recorded its finding on some of the issues, not preliminary, and then framed three additional issues leaving them to be tried and decided by the trial court. It is not a case where a retrial is considered necessary. Neither Rule 23 nor Rule 23-A of Order 41 applies. None of the conditions contemplated by Rule 27 exists so as to justify production of additional evidence by either party under that Rule. The validity of remand has to be tested by reference to Rule 25. So far as the objection as to maintainability of the suit for failure of the plaint to satisfy the requirement of Forms 47 and 48 of Appendix A Code of Civil Procedure is concerned, the High Court has itself found that there was no specific plea taken in the written statement. The question of framing an issue did not, therefore, arise. However, the plea was raised on behalf of the Defendants purely as a question of law which, in their submission, strikes at the very root of the right of the Plaintiff to maintain the suit in the form in which it was filed and so the plea was permitted to be urged. So far as the plea as to readiness and willingness by reference to Clause (c) of Section 16 of the Specific Relief Act, 1963 is concerned, the pleadings are there as they were and the question of improving upon the pleadings does not arise inasmuch as neither any of the parties made a prayer for amendment in the pleadings nor has the High Court allowed such a liberty. It is true that a specific issue was not framed by the trial court. Nevertheless, the parties and the trial court were very much alive to the issue whether Section 16(c) of the Specific Relief Act was complied with or not and the contentions advanced by the parties in this regard were also adjudicated upon. The High Court was to examine whether such finding of the trial court was sustainable or not -- in law and on facts. Even otherwise the question could have been gone into by the High Court and a finding could have been recorded on the available material inasmuch as the High Court being the court of first appeal, all the questions of fact and law arising in the case were open before it for consideration and decision.

Therefore, the High Court rightly rejected the contention of the Defendants on the above point.

15. Our attention is also drawn by the learned Counsel for the Defendants, to the copy of the report of Advocate Commissioner (Annexure P-2) in which the Advocate Commissioner has reported that the Defendants were found in possession of the disputed property.

16. However, in our view, Advocate Commissioner's report, in the present case, is against the weight of the oral and documentary evidence on record which sufficiently proves that Plaintiff was in possession over plot No. 358, and for several years he was paying the house tax as was found by the trial court on the basis of house tax receipts and extracts of house tax Assessment Register. It is not disputed that plot No. 357 belonging to the Defendants was in south of plot No. 358, and house of the Defendants was situated over their plot. The trial court has decreed the suit only in respect of plot No. 358.

17. For the reasons, as discussed above, we find no illegality with the impugned order whereby the High Court has allowed Second Appeal, and restored the decree passed by the trial court. Accordingly, this appeal is dismissed. No order as to costs.