Smt. Neeta Gajwani and Others Vs Hari Ram Achharia and Others

Court: Allahabad High Court (Lucknow Bench)

Date of Decision: Dec. 7, 2012

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 100
Easements Act, 1882 â€" Section 52
Registration Act, 1908 â€" Section 17(1)(b)
Transfer of Property Act, 1882 â€" Section 105

Citation: (2013) 2 ADJ 770

Hon'ble Judges: Saeed-Uz-Zaman Siddiqi, J

Bench: Single Bench

Advocate: Aslam Khan, for the Appellant; Deepanshu Das and Yogesh Gurnanee, for the Respondent

Final Decision: Dismissed

Judgement

Saeed-Uz-Zaman Siddiqi, J.
This second appeal has been preferred against the judgment and decree dated 17.10.2012, passed by the

Learned Additional District Judge (Court No. VII), Lucknow in Regular Civil Appeal No. 53 of 2012, by which the judgment and decree dated

15.2.2012 passed by Learned Additional Civil Judge (Senior Division), Court No. 21, Lucknow in Regular Suit No. 77 of 2009 has been set

aside and the plaintiff"s suit has been decreed.

Dr. L.P. Misra filed vakalatnama on behalf of the respondents.

Heard learned counsel for the appellants as well as learned counsel for the respondents and have gone through the records.

An expose of the facts may now be given to the extent, necessary for explaining the setting of the contentions between the parties.

One Prabhu Dayal (deceased) had two sons Hariram Achhariya and Kanhaiya Lal Achhariya, besides one daughter Nita Gajwani. The two

brothers Hariram Achhariya and Kanhaiya Lal Achhariya purchased the disputed property. Kanhaiya Lal Achhariya died before 20.3.1978,

leaving behind widow Pramila Achhariya and one son Ashok Kumar Achhariya. The name of wife of Sri Hariram Achhariya is Smt. Raju

Achhariya. Since both the brothers have purchased different properties, they separated their shares through family settlement in the form of

Memorandum of Understanding"" on 27.9.1997. In order to legalise the same, Regular Suit No. 188 of 2009 was filed, which was decided in

terms of compromise 51 A and the suit was decreed in terms of compromise. The dispute relate to a portion of the disputed property, which fall in

the share of Hariram Achhariya and Smt. Raju Achhariya. At this stage, it is relevant to mention here that the disputed property was in permissive

possession of the defendant/appellant, who is the real sister of Hariram Achhariya and Kanhaiya Lal Achariya. Sri Hariram Achhariya and wife

Raju Achhariya filed suit for possession and damages on the ground that since Smt. Nita Gajwani (defendant No. 1) is the real sister of plaintiff

No. 1 and defendant Nos. 2 and 3 (Defendant No. 4 is the wife of defendant No. 2), the disputed property was given on license for a short period

to the defendants. They did not vacate and 27 (twenty-seven) years have elapsed. When the plaintiffs asked the defendants to vacate by revoking

the license, they did not vacate, hence notice dated 27.10.2008 was given to the defendants, which was served upon them, but they did not

vacate. Hence, the suit was filed for eviction and damages for use and occupation @ Rs. 2000/- per day. The defendants contested the suit, inter

alia, on the ground that the disputed house bearing No. 34/29 (b) situated at 9 Shahnazaf Road, Lucknow is not exclusively owned by the

plaintiffs, which was purchased by Smt. Pramila Achhariya, Smt. Raju Achhariya, Ashok Kumar and Hariram Achhariya through sale-deed dated

20.3.1978, who, thereupon got it demolished and jointly raised new constructions and occupied their portions. The factum of license was also

denied by the defendants. But the defendants admitted that Smt. Pramila Achhariya has permitted them to occupy the disputed premises on ground

floor, who died and her legal heirs also permitted the defendants to continue their possession in the disputed premises. There was no rent or license

fee. It was further pleaded by the defendants that the plaintiffs are not the exclusive owners of the disputed premises and, as such, they have no

authority to revoke the license. The defendants also pleaded that memorandum of understanding (family settlement) is a fictitious document and, on

its basis, the plaintiffs have got no right or title.

2. The Learned Trial Court framed seven issues. Ultimately, the suit was dismissed by the learned Trial Court on the ground that the Family

settlement in the form of memorandum of understanding is an unregistered document and on its basis the decree passed by learned Civil Judge

(Senior Division) in Regular suit No. 188 of 2003 dated 20.4.2008 is void. Aggrieved by the said judgment and decree, the plaintiffs preferred

regular Civil Appeal, which was registered as Regular Civil Appeal No. 53 of 2012. The appeal has been allowed and the findings of the learned

Trial Court have been set aside and the suit has been decreed by the learned First Appellate Court, against which this second appeal has been

preferred.

3. Admittedly, defendants are not the owners of the disputed property. It is also admitted that the disputed property was purchased by the two

real brothers of defendant No. 1 and remaining defendants are sons and daughter of defendant No. 1. It is also not disputed that the defendants

are occupying the disputed premises on the basis of permission granted by its owners, who are the real brothers or their legal representatives,

without any condition to pay any rent. Though, the defendants have specifically denied that any lease or license, yet their possession is nothing

more than either lessee or licensee. Since there is no lease nor any rent deed, as admitted between the parties, It is nothing more than a license,

which means to give a license or permit a person to occupy when the land owner allows to do work or perform an act on the land owner''s

property. The visitor has a license to enter into the property. This kind of license need not be written, signed and registered. It may be oral or it

may be implied by the relationship or actions of the parties. Section 52 of the Easement Act defines license as under:

License"" defined.--Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the

immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an

easement or an interest in the property, the right is called a license.

It is obviously different with a lease as defined u/s 105 of Transfer of Property Act. This plea was not seriously placed before the two Courts

below, nor it has been impressed upon this Court either in the memorandum of Appeal or during the course of argument.

4. The only point raised before this Court was that the memorandum of understanding (Family Settlement) was an unregistered document and it

has wrongly been relied by the Learned Civil Court in an earlier suit bearing Original Suit No. 188 of 2003, which was decreed on the basis of

compromise vide judgment and decree dated 20.4.2008. Impressed by these arguments of the appellants, the learned trial Court was also swayed

to hold that the decree passed by the then Civil Judge was a nullity, just because it is an unregistered document and could not have formed the

basis of suit, in view of Section 17 (1) (b), Indian Registration Act. The said decree still stands, which has not been altered, set aside, modified,

quashed or otherwise rescinded by any supervisory or appellate forum.

5. The learned Trial Court has committed this basic error on point of law. A decree of a Court of law either passed after contest or passed without

contest or passed ex parte or passed on the basis of compromise or any other form is a decree, which is, by all means, binding on all the Courts.

This Court is unable to understand as to how the learned trial Court has declared the said decree as void and non-est and is not binding upon the

Court. This is obviously perverse, as the decree has been passed by the same Court. Though, the Presiding Officer might have been changed, yet

''Court'' means ''Court'' and not the Presiding Officer. In either case, the said decree was passed by a co-ordinate Bench, which has not been

challenged anywhere, nor even in this suit, thus, it has attained finality.

6. The word ''perverse'' has been defined as deliberately departing from, what is normal and reasonable. It obviously means unreasonableness and

irrational.

This perversity has rightly been corrected by the learned first appellate Court. A Court of law, particularly, a Civil Court of original jurisdiction

cannot declare any decree passed by it, in an earlier suit, as void and non-est and is not binding upon the Court itself. Unless it is specifically

challenged and is under issue. The said decree, if obtained by fraud, could well have been challenged and it could have been declared as void on

the ground of the said fraud. In such a suit, the decree can be set aside on the basis of proof or disproof by the parties of that decree or by the true

owner or any other affected person, as the case may be. A licensee has no right to claim that any memorandum of understanding of family

settlement among the owners was not registered, and the suit filed on the basis of it earlier, was not maintainable, in which the defendants were not

parties nor their right or title has been affected by that decree.

7. The learned first appellate Court has rightly discussed the law, as applicable to the facts of the case. Moreover, the memorandum of

understanding or family settlement, as the case may be, is not the basis of this present suit, which is based upon the license. Admittedly, the

defendants have no title nor they are its owner in any form.

8. Learned counsel for the appellants vehemently argued that the family settlement which gives right to some of the owners, introduces new owner

or takes away the rights of ownership of some of the co-owners, should necessarily be registered. That legal proposition has rightly been settled by

the Hon''ble Apex Court by a full Bench in the case of Kale and Others Vs. Deputy Director of Consolidation and Others, and Lachhman Dass

Vs. Ram Lal and Another, . This legal proposition is not at all relevant and the thrust of the learned counsel for the appellants on this issue is

nothing but a camouflage to delay the disposal of controversy finally, which shall result in nothing less than perpetuity in occupation of the

defendants, who are mere licensees and their license has been terminated through written notice, which has been served upon them.

9. The defendants are taking undue advantage of their proximity and blood relationship with the plaintiffs to continue in possession which has

become adverse, after the expiry of the period of notice of termination of license. No substantial question of law is involved in this case.

10. In Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd., , the Hon"ble Apex Court for the purposes

of determining the issue has held:

The proper test for determining whether a question of law raises in the case is substantial, would, in our opinion, be whether it is of general public

importance or whether it directly and substantially affects the rights of the parties.

11. Further in Rajeshwari Vs. Puran Indoria, , it was held:

The Court, for the reasons to be recorded, may also entertain a second appeal even on any other substantial question of law, not formulated by it,

if the Court is satisfied that the case involves such a question. Therefore, the existence of a substantial question of law is a sine-qua-non for the

exercise of jurisdiction under the provisions of Section 100 C.P.C. The second appeal does not lie on the ground of erroneous findings of facts

based on appreciation of the relevant evidence.

12. In AIR 1947 19 (Privy Council) , it has been held:

the Privy Council has provided the guidelines as in what cases the second appeal can be entertained, explaining the provisions existing prior to the

amendment of 1976, observing.... that miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to

make that which happen not in the proper sense of the word a judicial procedure at all. That the violation of some principles of law or procedure

must be such erroneous proposition of law that if that proposition to be corrected, the finding cannot stand, or it may be the neglect of some

principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the Courts could

arrive at their finding, is such a question of law.

13. In Vijay Kumar Talwar Vs. Commissioner of Income Tax, Delhi, , it has been held:

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 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 will, therefore, depend on the facts and

circumstances of each case, whether a question of law is a substantial one or not; the paramount overall consideration being the need for striking a

judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any

lis.

14. In the case of Union of India v. Ibrahim and another in Civil Appeal No. 1374 of 2008, decided on July 17, 2012, the Hon"ble Apex Court

has held:

There may be exception circumstances where the High Court is compelled to interfere, notwithstanding the limitation imposed by the wording of

Section 100 CPC. It may be necessary to do so for the reason that after all the purpose of the establishment of Courts of justice is to render

justice between the parties, though the High Court is bound to act with circumspection while exercising such jurisdiction. In second appeal the

Court frames the substantial question of law at the time of admission of the appeal and the Court is required to answer all the said questions unless

the appeal is finally decided on one or two of those questions or the Court comes to the conclusion that the question(s) framed could not be the

substantial question(s) of law. There is no prohibition in law to frame the additional substantial question of law if the need so arises at the time of the

final hearing of the appeal.

15. A pragmatic overview of these legal descriptions have reduced the controversy to zero.

While concluding the arguments, learned counsel for the respondents made statement, at the Bar, that in order to keep their (the appellants)

relationship congenial and cordial, the respondents have to forgive the damages awarded by the learned first appellate Court. But, as soon as he

advanced to oppose the admission it was argued by the learned counsel for the respondents that this is a case which exhibits that the respondents,

licensors and the true owners of the property have been unnecessarily dragged by the licensee, who is nothing more than their kith and kin and the

thrust was made to dismiss the appeal with exemplary cost.

While weighing both these arguments, I find that the present litigation exhibits the growing tendency among ownership-less occupants, to

perpetuate their possession, by dragging the true owners into multifarious litigations and oftentimes they get success in deriving benefits of the

complexities of rules of procedure and misinterpretations or derailed interpretations. Sometimes it is contumacious and sometimes it is the outcome

of dormancy. In either case, if there is any slip by the vigilant Courts, it brings bad name to the judicial system.

The cussedness of the appellants is not unusually abnormal. Hence, the grant of exemplary cost does not appear to be in consonance with the rules

of equity justice and good conscious. While holding this, it must be observed that when the respondents have volunteered to forgive the damages,

the Court must forgive exemplary cost and thus to take a lead over a litigant.

The first limb of the argument, thus, is merit-less and bogus in the eyes of law. Another argument was placed by learned counsel for the appellant

that the learned First Appellate Court has wrongly decreed the amount of damages. This is purely a finding of fact and the second appeal cannot

be admitted, merely on the ground that any particular amount of damages has been decreed by the learned First Appellate Court, which is a

question of fact and no perversity has been assigned to it. Had the learned Trial Court awarded any amount of damages which was not claimed by

the plaintiff or which was more than the claimed amount, it would have attracted the attention of Court of appeal exercising jurisdiction u/s 100

C.P.C.

With the above observations, the Second Appeal is dismissed.