

(2004) 08 AHC CK 0319

Allahabad High Court

Case No: F.A.F.O. No. 947 of 1994

Smt. Shakooran Begum and
Others

APPELLANT

Vs

Mohd. Waris and Others

RESPONDENT

Date of Decision: Aug. 4, 2004

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 47 Rule 1

Citation: (2005) 1 AWC 648

Hon'ble Judges: Prakash Krishna, J

Bench: Single Bench

Advocate: Arjun Singhal, N.C. Rajvanshi, P.K. Srivastava and M.K. Rajvanshi, for the Appellant;

Final Decision: Allowed

Judgement

Prakash Krishna, J.

This is plaintiffs appeal against the order allowing the review application passed by the court below.

2. The plaintiff/appellant filed Suit No. 335 of 1980 against the present respondents for possession over a piece of house described by letters A.B.C.D. in the plaint map. The suit for ejectment and recovery of damages was filed on the allegation that originally one Abdul Qayum was owner in possession of the disputed property, who sold it by a registered sale deed dated 1.12.1933 in favour of Smt. Usmani Begum. Smt. Usmani Begum by means of registered sale deed dated 26th November, 1956, sold the property in question to the plaintiffs. In the month of September, 1980, the plaintiff came to know that the defendant Nos. 1 and 2 got a sale deed executed by defendant No. 3 in respect of the disputed property, for a sum of Rs. 6,000. The defendant No. 3 was never the owner or tenant of the disputed property and as such he could not execute the sale deed in favour of defendant Nos. 1 and 2.

3. The defendants in the written statement accepted that Abdul Qayum was the original owner of the property A.B.C.D. However, they have denied the title of the plaintiff.
4. The trial court framed seven issues. Issue No. 1 is with regard to the ownership of the disputed property A.B.C.D. Issue No. 2 is whether the defendant Nos. 1 and 2 were the tenants of the plaintiff and if so its effect. Issue No. 3 is whether the defendant Nos. 1 and 2 became the owner of the disputed property in view of the sale deed of the year 1974. Issue No. 4 is whether the plaintiffs are entitled to recover the damages for the unauthorised use and occupation of the defendants over the land in question. The other issues are not relevant for the purposes of the disposal of the present appeal.
5. The trial court decreed the suit by its Judgment and decree dated 23rd February, 1982, on the findings that the plaintiffs are the owners of the house in question. The defendants have failed to prove their title with respect to the land in question. A decree for the defendants with respect to the property A.B.C.D. was passed. Along with it a sum of Rs. 100 per month was awarded as damages in favour of the plaintiffs.
6. The said decree was challenged by the defendant/ respondent Nos. 1 and 2 by filing Civil Appeal No. 139 of 1982. The IIIrd Additional Civil Judge, Bulandshahr. after taking into consideration the evidence on record dismissed the appeal on merit by its judgment and decree dated 10th August, 1990. The appellate court examined the matter in great depth. It has taken into consideration the oral evidence as well as documentary evidence produced by the parties. Ultimately it was found that the plaintiffs have been able to prove their ownership and possession with respect to the disputed property and it was further held that defendant Nos. 1 and 2 came into possession of it as tenants. It has also taken into consideration the sale deed of the year 1974 executed by Mohammad Alam, the defendant No. 3. The appellate court has confirmed the findings recorded by the trial court that Mohd. Alam (defendant No. 3) had no right, title or interest to execute the sale deed. It also considered the quantum of damages awarded by the trial court for the use and occupation of the disputed property by defendant Nos. 1 and 2 and confirmed that the award of damages at the rate of Rs. 100 per month is legal and justified.
7. Second Appeal No. 1607 of 1990 was filed by defendant Nos. 1 and 2 in this Court. The second appeal was taken up for consideration along with the aforesaid first appeal from order. The second appeal has been dismissed in default on 29th July, 2004, as the appellant's counsel did not turn up even in the revised list.
8. Defendant Nos. 1 and 2 Mohd. Waris and Naseem Ahmad besides filing the aforesaid second appeal in this Court, also filed an application before the court below for reviewing its judgment and decree under appeal. The court below by the impugned order dated 5th August, 1994, allowed the review application with costs

and set aside the judgment and decree passed in Civil Appeal No. 139 of 1982. Aggrieved against this order the present first appeal from order has been filed at the instance of the plaintiffs.

9. Heard learned counsel for the appellants. None appeared on behalf of the respondents. The service on respondent Nos. 1 and 2 was held sufficient by the order dated 8th January, 2004. The service on respondent No. 3 was held sufficient by me as the registered letter sent to respondent No. 3, as per office report has not returned after service.

10. Learned counsel for the appellant submitted that the court below has committed illegality in allowing the review application. The court below has heard the case on merits and re-appreciated the evidence on record, which according to the learned counsel for the appellant is not permissible under law in the exercise of review jurisdiction. It was submitted that the power of the Court to review its order is very limited one. An error in the Judgment cannot be corrected in exercise of power of review.

11. I have given my careful consideration to the submissions of the learned counsel for the appellants. The power of review has been conferred under Order XLVI Rules 1 and 2 of the Civil Procedure Code.

12. Reverting to the facts of the present case there is no dispute with regard to the fact that Abdul Qayum was owner of the disputed property shown in the plaint map by letters A.B.C.D.E.F.G.H. It is also admitted case of the parties that Abdul Qayum sold the property shown by letters A.B.C.D. to Zafar Hussain by means of sale deed dated 9th January, 1932. He sold the remaining property by means of a registered sale deed dated 1st December, 1933 to Smt. Usmani Begum wife of Zafar Hussain. There is also no dispute that after the death of Sri Zafar Hussain his widow Smt. Usmani Begum became the owner of the property A.B.C.D.E.F.G.H. and the property A.B.C.D. The plaintiff claims that Smt. Usmani Begum by means of sale deed dated 26th November, 1956, sold the entire property purchased by her as well as by Zafar Hussain to the plaintiffs, in contra, the case of the defendant/respondent Nos. 1 and 2 is that the disputed property A.B.C.D. which was purchased by Dr. Zafar Hussain the husband of Smt. Usmani Begum was inherited by Mohd. Alam, the nephew of Dr. Zafar. Dr. Zafar died in the year 1955 and had no issue. In 1956 Smt. Usmani Begum sold her share in the property to the plaintiff and Mohd. Alam, defendant No. 3 sold the same to the defendant Nos. 1 and 2. The trial court as well as the appellate court both have found on the interpretation of the sale deed dated 26.11.1956 that Smt. Usmani Begum sold the entire property, which includes the property inherited by her from her husband. By impugned order the court below in the exercise of power of review has come to the conclusion that the interpretation put by the trial court as well as by the appellate court earlier in the appeal is not correct. The order of the court below passed on the review application is based upon the re-appreciation of the oral evidence as well as of the sale deed dated

26.11.1956. The court below exceeded in its jurisdiction while exercising the power of review to re-appreciate the oral and documentary evidence and come to a different conclusion.

13. A further reading of the order of the court below passed on the review application shows that it has disbelieved the plaintiffs oral testimony on the ground that there are contradictions. The trial court as well as the appellate court while deciding the appeal earlier has believed the oral testimony of the plaintiffs witnesses. The court below has undertaken an exercise to re-appreciate the evidence afresh. Similarly, the trial court as well as the first appellate court on appeal recorded a finding that in the original written statement the defendant did not plead regarding any Hiba" (gift). By way of amendment in the written statement, after seven years a plea of Hiba was introduced, However, both the courts below rejected the said defence of defendant Nos. 1 and 2 on the ground that they have failed to produce any satisfactory evidence of any Hiba. The Court while exercising the review jurisdiction has accepted the plea of Hiba.

14. The trial court as well as the appellate court noticed the contradictions in the oral testimony produced by the defendants. Without taking into consideration the said findings, the court below in the exercise of review jurisdiction has preferred to place reliance on the oral testimony of the defendants.

15. Order XLI Rule 1 confers power of review on a Court. In the present case, the review was sought by the defendant Nos. 1 and 2 on the ground of error in the appellate court's Judgment. The grounds raised in the review application are quoted below :

2. Because this Hon"ble Court has not considered the contents of sale deed, paper No. 9-A1, which was the basis of the title of the plaintiffs/opposite parties. It has been specifically mentioned therein that the house which is being sold, was purchased by Smt. Usmani Begum, by means of sale deed dated 1.12.1933 ; paper No. 10-A1, executed by Abdul Qayum. Therefore, the title which has been transferred by the sale deed, paper No. 9-A1 relates to the sale deed dated 1.12.1933 executed by Shri Abdul Qayum in favour of Shrimati Usmani Begum. From the sale deed dated 1.12.1933 it will be clear that only that house which has been shown by letters A.E.F.G.H. was sold by Abdul Qayum to Smt. Usmani Begum. This was a simple mathematical equation. This Hon"ble Court has committed gross error which is apparent on the face, of record by not considering the contents of the sale deed, paper No. 9A and the contents of sale deed dated 1.12.1933, paper No. 10-A1.

3. Because otherwise also the boundaries mentioned in both the above sale deeds are only of the western house shown by letters AEFGH as will be clear from the statement and admission of P.W. 1, Shrimati Shakooran, who is plaintiff herself. It was not open for the learned court to have avoided consideration of own admissions of the plaintiffs/ opposite parties.

4. Because there was no conflict in between area and boundaries, it will be very significant to note that the area has not even been mentioned in any of the sale deeds. It is really very surprising as to how this Hon"ble Court say that there was conflict in between the area and the boundaries and therefore, the boundaries will prevail. The Judgment of Calcutta High Court in AIR 1950 Cal 50, to the effect that if there was any conflict in between the area and the boundary ; that will prevail, was not at all applicable in the present as there was no conflict in between the area and the boundaries.

5. That the plaintiff/opposite parties could not acquire better title than the actual title transferred to them. Shrimati Usmani Begum had transferred and could transfer only that much of title which was acquired by her by means of sale deed dated 1.12.1933, paper No. 10-A1 executed in her favour by Abdul Qayum which was admittedly executed in respect of the house shown by letters A.E.F.G.H.

6. Because this Hon"ble Court has also failed to consider the contents of sale deed, paper No. 39C1, executed by Abdul Qayum in favour of Zafar Hussain, dated 19.1.1932 which was in respect of house shown by words A.B.C.D. given in the same plaint and the subsequent sale deed executed by Mohd. Alam nephew of Zafar Hussain in favour of the defendant, applicant Nos. 1 and 2.

7. Because this Hon"ble Court has not considered the evidence on record.

8. Because admittedly the house shown by word A.B.C.D. and A.E.F.G.H. are two separate houses as admitted by the plaintiffs-opposite parties in the plaint. The said admission was brought on record by the plaintiffs/ opposite parties themselves by way of amendment in the plaint during course of appeal. From para 2 of the amended plaint, it was clear that the disputed property consisted of two separate issues. The house shown by words E.F.G.H. is alleged by the plaintiff/opposite parties to have been purchased by Smt. Usmani Begum by means of sale deed, while the house shown by words A.B.C.D. is now alleged to have been inherited by her. From the contents of paper No. 9-A1, it is clear that the plaintiffs/ opposite parties purchased only that house which was acquired by Smt. Usmani Begum by means of sale deed dated 1.12.1933 and not the house which she acquired through inheritance. This Hon"ble Court has failed to consider this clear cut admission made in the plaint and in the sale deed, paper No. 9-A1 read with the plaint.

9. Because the plaintiff/ opposite parties could have succeeded on the basis of their title and not on any alleged weakness of the defendants/ applicant's title. In the present case, the plaintiffs/ opposite parties have not at all been able to prove their own title. The rulings cited on behalf of the defendants/ applicants viz [Roy and Co. and Another Vs. Sm. Nani Bala Dey and Others](#), and [Udrej Singh and Another Vs. Ram Bahal Singh and Others](#), , before this Court have not been considered.

10. Because this Hon"ble Court has observed at page 10 of the judgment that Mohd. Alam is alleged to be the son of Sayyad Hussain. This is the own creation of this

Hon"ble Court. Neither the plaintiffs nor the defendants ever alleged Mohd. Alam to be the son of Sayyed Hussain.

11. Because absolutely there was no need to produce Mohd. Alam, defendant, there was sufficient documentary evidence on record and there was own clear admission of the plaintiffs/ opposite parties to show that they were the owners of the disputed property and hence there was no need to produce any further evidence in the case for the defendants.

12. Because otherwise also the Mohammadan widow only inherits 1/4th share in her husband"s property and the nephew of the deceased inherits 3/4 share according to the settled principles of Mohammadan Law.

13. Because there are sufficient grounds for reviewing the judgment passed by this Hon"ble Court."

16. A bare perusal of the aforesaid grounds clearly shows that they do not point out any error apparent on the face of record. The Supreme Court has laid down the scope and width of the review jurisdiction conferred under Order XLVII Rule 1, C.P.C. See [Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh](#), . The Supreme Court has pointed out that there is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by "error apparent". A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. Where without any elaborate argument, one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.

17. [Babboo alias Kalyandas and Others Vs. State of Madhya Pradesh](#), , is an authority for the proposition that a power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of errors committed by the subordinate court. The power of review can be exercised where some mistake or error apparent on the face of record is found.

18. The Supreme Court in the case of [Smt. Meera Bhanja Vs. Smt. Nirmala Kumari Choudhury](#), , has held that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order XLVII Rule 1 C.P.C. In this case it has followed its earlier judgment given in the case of [Babboo alias Kalyandas and Others Vs. State of Madhya Pradesh](#), . It has also considered its earlier judgment given in the case of [Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale](#), . In that case it was held that an error which to be established by long drawn/ procedure of reasoning on the points where they may conceivably be two opinions-hardly be said to be an error apparent on the face of record. Where an alleged error is far from self evident and it can be established, it is to be established by lengthy and complicated arguments, such an error cannot be cured

by reviewing the order.

19. To the same effect is [Parsion Devi and Others Vs. Sumitri Devi and Others](#), . In this case the Supreme Court has considered its earlier judgments referred to above. It has been held that a review petition has a limited purpose and cannot be allowed to be "an appeal in disguise".

20. In the light of fairly well-settled proposition of limited scope it is obvious that the court below overstepped the jurisdiction vested in the Court under Order XLVII Rule 1, C.P.C. The main controversy between the parties is with regard to the extent of the property sold through the sale deed of the year 1956. Another controversy is whether Abdul Qayum was the nephew of Zafar Hussain and inherited the property left by Dr. Zafar Hussain. These questions were decided on the basis of evidence by the first appellate court in appeal. Taking the judgment of the court below on its face value at the most it can be said that the appellate court by deciding the appeal earlier did not correctly appreciate the evidence, but it will not give the Court a power to review its judgment. The error if any in appreciation of evidence or law can be corrected only by an appellate court and not in the exercise of review jurisdiction. The court below clearly exercised the appellate jurisdiction, while allowing the review application, which is not permissible under the law. The order passed by the court below cannot be sustained and is liable to be set aside.

21. In the result, the appeal is allowed and the review application stands dismissed.