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(2009) 11 AHC CK 0293

Allahabad High Court

Case No: None

Karimullah (D) by L.Rs. APPELLANT

Vs

Majeed RESPONDENT

Date of Decision: Nov. 18, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100

Citation: (2010) 3 AWC 3074 : (2010) 2 CivCC 379

Hon'ble Judges: Arun Tandon, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Arun Tandon, J.
This is defendant''s second appeal. Plaintiff filed Original Suit No. 214 of 1973 for perpetual injunction restraining the defendants from raising any construction over the land, more appropriately described in the plaint itself. According to the plaintiff the land was his Sahan and the defendants had no right to interfere with the possession over the same. The suit was contested by the defendants and it was claimed that the property was their Sahan. Before the trial court neither of the parties led any documentary evidence. They relied upon oral evidence only. The trial court on the basis of the evidence led by the parties proceeded to decree the suit and granted perpetual injunction in favour of the plaintiff.

2. Not being satisfied the defendants filed Civil Appeal No. 395 of 1975. Before the first appellate court an amendment application was made on behalf of the defendants and certain facts were sought to be introduced. This application was rejected vide order dated 24.3.1977 after recording a finding that these facts are contrary to that which were pleaded in the written statement earlier and, therefore, application in that regard was rejected. Consequently the application for bringing on record additional evidence was also rejected. The appellate court thereafter proceeded to decide the appeal and after

noticing the various issues framed and on consideration of the evidence led by the parties it has been held that the defendant has not been able to establish his case. The appeal has accordingly been dismissed vide judgment dated 20.4.1977. Hence, this second appeal.

3. On behalf of the appellant it is contended before this Court that the first appellate court has misdirected itself by referring to the weakness in the case of the defendants instead of referring to the case of the plaintiff. He submits that the appellate court should have examined as to whether the plaintiff has been able to establish his case and as to whether the findings recorded by the trial court qua the property were legally justified or not.

4. Counsel for the appellant has also placed reliance upon the judgment of the Hon"ble Supreme Court in the case of B.K.N. Narayana Pillai Vs. P. Pillai and Another, and Akshaya Restaurant v. P. Anjanappa and Anr. 1994 (Suppl SCC 267 : 1995 (3) AWC 1872 (SC), for questioning the order refusing to grant the amendment. It is stated that the first appellate court being a court of fact and law both, has to go into the issues which have been raised in the appeal for the purposes of challenging the findings recorded by the trial court. He submits that the appellate court instead of examining the issue raised in the memo of appeal has proceeded to discuss the evidence led by the defendants only for the purposes of holding that the defendants have not been able to establish their case.

5. On behalf of the respondents-plaintiff it is contended that since the findings recorded by the first appellate court are in affirmance of the findings recorded by the trial court, it is not necessary for the first appellate court to repeat the facts again for arriving at the same conclusion.

6. The present appeal was admitted under orders of the Court dated 18.5.1977 however no substantial question of law was framed.

7. Counsel for the appellant submits that the following substantial questions of law arises in the present second appeal:

(a) Whether the trial court would have dismissed the appeal filed by the defendant appellant only after referring to the evidence led by the defendants and by holding that the defendants have not been able to establish his case.

(b) Whether the powers of the first appellate court being coextensive with that of the trial court and, therefore, issues of fact and law need to be examined by the first appellate court, i.e., it is obligatory for the first appellate court to examine the correctness or otherwise the findings recorded by the trial court on the issue as to whether the plaintiff had established that he was the owner of the property in question or not.

(c) Whether in a case where the rights of the parties are dependent upon the oral evidence only, it is necessary for the first appellate court to examine the evidence led for

the purposes of coming to the same conclusion as that recorded by the trial court.

8. I have heard learned Counsel for the parties and have gone through the records of the present second appeal.

9. For the purposes of appreciating the controversy raised, it would be worthwhile to refer to Section 96 which confers the substantive power of right to appeal. The procedure for the purpose has been laid down in Order XLI. It is apparently clear that the grounds of objection to the decree can be both in respect of the findings of fact recorded as well as on issues of law. Section 100 provides the substantial right of second appeal and restrict the entertainment of such second appeal on substantial question of law only. From the reading of the aforesaid two provisions, it would be apparently clear that while power of the first appellate court to entertain the appeal is both on issues of fact as well as on issues of law, the power of the second appellate court is confined to entertain the second appeal on substantial question of law only.

10. Keeping in mind the aforesaid broad distinction between the first appellate court and the second appellate court, reference may be made to the judgments of the Hon''ble Supreme Court which have dealt with the issue as to how the findings of the trial court are to be appreciated by the first appellate court. The Hon''ble Supreme Court of India in the case of Madhukar and Ors. v. Sangram and Ors. 2001 (3) AWC 1984, specifically in paragraphs 5 and 6 has held as follows :

5. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. It has failed to discharge the obligation placed on a first appellate court.... First appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings.

6. In Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., , this Court opined :

The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind, and record findings supported by reasons, on all the issues arising alongwith the contentions put forth, and pressed by the parties for decision of the appellate court.

11. Order XLI, Rule 27 read with Rule 28 permits the first appellate court to accept additional evidence on record. Similarly amendment at the appellate stage is also permissible. The Hon''ble Supreme Court of India in the case of B.K.N. Narayana Pillai Vs. P. Pillai and Another, has held that power to allow amendments being wide, the liberal approach is the general rule.

12. From the order of the first appellate court this Court finds that except for referring to the evidence led by the parties and the findings recorded by the trial court, it has not considered the pleas raised by the appellant for challenging the findings recorded on issues of fact.

13. The requirement for the first appellate court to deal with the evidence led by the parties in the facts and circumstances of the case was more necessary as both the parties had not lead any documentary evidence in support of their case and both had relied on oral evidence only. In the opinion of the Court the evidence of the witnesses therefore did need examination by the first appellate court for arriving at a conclusion as to whether the findings recorded by the trial court was legally correct or not. This Court finds that such an exercise which was required to be undertaken under law by the first appellate court before affirming the finding has not been so discharged.

14. In view of the powers of the first appellate court as noticed hereinabove qua its competence to reverse the findings of fact after reappraising the evidence, this Court is of the confirmed opinion that the first appellate court has failed to discharge its statutory obligation in the facts of the present case and has wrongly proceeded to hold that the defendants have not been able to establish their case.

15. In the totality of the circumstances as noticed hereinabove, this Court finds that the substantial questions of law framed in the present Second Appeal have to be answered in favour of the appellant. The judgment and order of the first appellate court is, therefore, set aside. The first appeal is restored to its original number. The matter is remanded to the first appellate court for decision afresh in light of the observations made.

Second appeal is allowed.