

Babulal Sharma Vs. Sant Kumar Bajoria

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Court : Guwahati

Decided On : Aug-25-2008

Judge : H.N. Sarma, J.

Appellant : Babulal Sharma

Respondent : Sant Kumar Bajoria

Advocate for Def. : Mr. H.S. Tangkhiew

Advocate for Pet/Ap. : Mr. M.F. Quereshi

Prior history : H.N. Sarma, J. 1. Challenge made in this petition is the judgment and order dated 27.9.2007 passed by the learned Additional District Judge, Shillong, in FAO No. 3 (SH)/2007 thereby allowing the appeal filed by the respondent herein. 2. I have heard Mr. M.F. Quereshi, learned Counsel for the plaintiff-petitioner and Mr. H.S. Tangkhiew, learned Counsel for the defendant-respondent. 3. The petitioner instituted Title Suit No. 36 (SH)/2007 in the Court of the Munsiff, Shillong, for declaration an

Judgement :

H.N. Sarma, J.

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thereby allowing the appeal filed by the respondent herein.

2. I have heard Mr. M.F. Quereshi, learned Counsel for the plaintiff-petitioner and Mr. H.S. Tangkhiew, learned Counsel for the defendant-respondent.

3. The petitioner instituted Title Suit No. 36 (SH)/2007 in the Court of the Munsiff, Shillong, for declaration and permanent injunction. To be specific, the prayers made in the suit are as follows:

a) A decree declaring that the plaintiff is a lawful tenant under the defendant and that the plaintiff is entitled to use for ingress and egress the unused portion of the defendant's land which stands in between the GS road and the tenanted premises by developing a passage at the own cost of the plaintiff over the aforesaid unused portion of the land owned by the defendant from the right hand side of the Shillong Co-operative Urban Bank Ltd. so as to facilitate ingress and egress for the customers of the plaintiffs hotel;

b) A decree declaring that it is the duty of the defendant to make available a proper path for ingress and egress to and from the tenanted premises;

c) A decree for permanent injunction restraining the defendant and/or his men, agents, servants, etc. from causing any hindrance in the use/development/construction of the passage leading to the tenanted premises from G. S. road by the right hand side of the Shillong Co-operative Urban Bank Limited;

d) A decree for permanent injunction restraining the defendant and/or his men, agents, servants, etc. from disturbing the peaceful possession and enjoyment of the tenanted premises till the plaintiff is evicted from the tenanted premises following due procedure of law;

e) A decree for mandatory injunction directing the defendant to allow the plaintiff to use/develop/construct at its own cost a passage for ingress and egress to the tenanted premises from the GS. Road by the side of the Shillong Co-operative Urban Bank Limited;

f) A decree for the cost of the suit;

g) A decree for any other or further relief or reliefs to which the plaintiff may be entitled to under law and equity.

Along with the said suit an application under Section 115, Order 39, Rules 1 and 2 CPC, was also filed praying for mandatory injunction, which was registered as Misc. Case No. 43 (SH) 2006.

4. The learned Munsiff vide order dated 20.4.2007 disposed of the injunction petition by passing the following order:

Accordingly this Court hereby grant an ad interim injunction in favour of the petitioner restraining the Ops, his men, agents and servants from disturbing the peaceful possession and enjoyment of the suit premises and the OP is directed not to obstruct and also not to disturb the petitioner if the petitioner construct an alternative way/path from the side of Shillong Co-operative Urban Bank Limited, Shillong at his own cost for ingress and egress to the suit premises. The petitioner is also entitled to get the police assistance from Sadar Police Station, Shillong if so demand while constructing the new path, however the petitioner should not re-open the old path which was closed by the Hon'ble High Court.

5. The legality of the aforesaid order was challenged before the learned Additional District Judge, Shillong, in FAO No. 3 (SH)/2007, which was finally disposed of by the learned Additional District Judge, Shillong, on 27.9.2007 allowing the appeal and setting aside the order of injunction passed by the learned trial Court. The appellate Court apart from other findings also held that the suit of the plaintiff is barred by res judicata.

6. Admittedly, the appeal before the learned trial Court was under Order 43, Rule 1(r), CPC, against an order passed under order 39, Rules 1 and 2, CPC. The appellate Court hearing an appeal against such an order of injunction is required to confine itself to the legality and the validity of the order of injunction only and test its validity on the touchstone of basic principles for passing an order of injunction, such as, prima facie case, balance of convenience, irreparable loss and public interest. The appellate Court is not entitled either to give finding on merit of the suit or touch the merit of the suit which is the function of the trial Court. In that

event, it would amount to pre-decision of the suit without giving any opportunity to the aggrieved party and that has been done in the instant case by the learned appellate Court. The finding of the learned appellate Court as made in paragraph-36 to the effect that the appeal in question being arisen from an order passed in an application under Order 39, Rules 1 and 2, CPC, the appellate Court has jurisdiction to decide the issue of res judicata, is totally unfounded in law and such an action is beyond the scope of such appeal. The learned appellate Court should have restricted itself to the legality and the validity of the order of injunction and confirm itself within conferred jurisdiction. By such finding the learned appellate Court held that the suit is barred by res judicata thereby precluding the defendant appellant from raising the said issue at the trial of the suit. Virtually by such finding the suit has been made infructuous.

7. In that view of the matter, the finding of the learned appellate Court that the suit is barred by res judicata stands set aside and quashed.

8. The aforesaid issue of res judicata shall be decided by the learned Munsiff by framing an issue to that effect. Any other observations touching the merit of the suit made by the learned appellate Court in the impugned order shall be construed to have made for deciding the appeal only and both the parties are to prove their irrespective cases before the learned trial Court independently and the aforesaid observation made in the impugned judgment would not be taken note of in deciding the suit on merit.

With the aforesaid observation and direction this revision petition stands disposed of.

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