

Trijugi Nath Agrawal and anr. Vs. Iiird Additional District Judge and anr.

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Court : Allahabad

Decided On : Oct-20-2003

Reported in : 2004(1)AWC77

Judge : Rakesh Tiwari, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 41, Rule 27

Appeal No. : C.M.W.P. No. 2481 of 2001

Appellant : Trijugi Nath Agrawal and anr.

Respondent : Iiird Additional District Judge and anr.

Advocate for Def. : A.K. Srivastava, S.C.

Advocate for Pet/Ap. : Wasim Alam, Adv.

Disposition : Petition allowed

Judgement :

Rakesh Tiwari, J.

1. Heard counsel for the parties and perused the record.

2. This writ petition is directed against the order dated 29.11.2000 passed by the IIIrd Additional District Judge, Mirzapur in Appeal No. 2 of 1997, Gopal Jee

Agarwal v. Trijugi Nath Agarwal and Ors., rejecting the application of the petitioner dated 17.1.2000, paper No. 18 'C' moved under Order XLI, Rule 27, C.P.C.

3. The brief facts of the case are that plaintiff respondent No. 2 Gopal Ji Agarwal filed Original Suit No. 45 of 1999 in the Court of Munsif, Mirzapur, for ejectment of the petitioner from the shop in dispute on the ground that he was the owner and in exclusive possession of the said shop on 15.1.1990. It was stated in the suit that when the plaintiff respondent No. 2 had gone to Mathura on a pilgrimage tour, the petitioner illegally broke the lock and took the possession of the shop in dispute in the night of 11.1.1990 and respondent could know about it when he came back on 12.1.1990. It is further stated that the police had also refused to lodge the F.I.R. as they were in league with the petitioners.

4. It appears from the record that the petitioners/defendants filed a composite written statement denying the allegation made in the plaint. Issues were framed and the evidence was adduced by the parties in support of their cases. In the suit the petitioners/defendants filed a copy of memorandum of family settlement dated 2.7.1992, paper No. 51 'C' by which the portion falling in the share of the plaintiffs/defendants and two other brothers were described, who are said to be in possession of their respective shares of the house in question.

5. The plaintiffs' respondent denied the family settlement dated 2.7.1992 while the trial court recorded a findings that there was family settlement amongst the parties regarding the property in dispute which had been arrived at in order to prevent future dispute amongst the parties. The trial court further held that the plaintiff respondents had no right and interest in the disputed shop nor he had been in possession of the said shop. The suit was accordingly dismissed by order and judgment dated 23.11.1986.

6. Aggrieved by the judgment and decree of the trial court dated 23.11.1996 the respondents filed Appeal No. 2 of 1997 before the District Judge, Mirzapur, which was transferred to Illrd Additional District Judge, Mirzapur, for adjudication and is said to be pending.

7. It is submitted by the counsel for the petitioner that during the pendency of the appeal, the petitioners came to know that respondent had executed a registered usufructuary mortgage in favour of one Smt. Sushila Devi Agarwal w/o Sri Ram Krishna Agarwal r/o Mohalla Vasnahi Bazar, district Mirzapur on 30.6.1999 for taking loan of Rs. Two lakh twenty five thousand in lieu of his share of his house, which was as per the family settlement dated 2.7.1992 but was being denied by the plaintiff. On coming to know the facts about the usufructuary mortgage, the petitioner obtained certified copy of the same and thereafter moved the application under Order XLI, Rule 27, C.P.C. for accepting the same as additional evidence as it was not available to the petitioners notwithstanding exercise of due diligence by him. It was prayed that the same may be admitted as additional evidence as it has come into existence during the appeal and was a necessary document for proper and just adjudication in the matter. The respondents filed objection on 15.2.2000 to the application of the petitioners under Order XLI, Rule 27, C.P.C.

8. Respondent No. 1 by the impugned order dated 29.11.2000, rejected the petitioners application paper No. 18 'C' holding that filing of evidence sought to be produced as additional evidence was not necessary at this stage but the points raised by the petitioner may be argued by him at the time of final hearing.

9. Aggrieved by the aforesaid order, the petitioners have approached to this Court by means of this writ petition and after assailing the impugned order. It is submitted that a self-contradictory stand is being taken by the plaintiff opposite party. On one hand Court has permitted the petitioners to argue the points at the time of final hearing and on the other the petitioner's application has been rejected, by which evidence was sought to be filed as additional evidence.

10. From the record, it is evident that the case of the petitioners in their written statement was that the property in suit was partitioned and share of the parties were demarcated in map and that they were in possession of their respective share and disputed shop did not fall in share of plaintiff. Family settlement dated 2.7.1992 was arrived at between family members but the respondent had denied the family settlement throughout before the trial court as well as before the appellate court.

11. Even though the respondent had denied the said family settlement throughout in the suit but the trial court on the basis of the evidence on record gave a findings that the family settlement was there which was proved and that plaintiff had no concern with the shop in dispute of which the petitioners were owners and in possession. It also appears from the record that the respondents admitted the existence of the family settlement dated 2.7.1992 in the usufructuary mortgage dated 30.6.1999 executed by him during the pendency of the appeal.

12. The counsel for the petitioners states that his case falls within the ambit of Order XLI, Rule 27 as the evidence sought to be produced was not available to the petitioners notwithstanding exercise of due diligence by him, and as such the evidence sought to be adduced by the petitioners ought to have been allowed to be admitted as additional evidence by the appellate court.

13. In the instant case, the appellate court had found the factum of family settlement dated 2.7.1991 to be proved. The respondent had also himself admitted the execution of the mortgage of the family settlement aforesaid during the pendency of the appeal. In these circumstances, no prejudice would be caused to any of the parties if the additional evidence as taken by the appellate court. This would not only help in doing substantial Justice but also advance the cause of justice and would be helpful in deciding the case. The appellate court lost sight of the fact that the respondent had been denying the family settlement throughout and denial of additional evidence may seriously prejudice the rights of the parties having share in the house in dispute, according to the said family settlement.

14. There is no Illegality or infirmity in the findings of the trial court regarding existence of settlement. It is the cardinal principle that it is the duty of the Courts not only to do Justice but also to prevent Injustice from being done. The appellate court has committed error in the impugned order by not allowing the additional evidence and only allowing the point to be argued regarding seriously contested facts without evidence.

15. For the reasons stated above the writ petition is allowed. The impugned order is quashed to the extent it disallowed the additional evidence of the petitioner. The appellate court is directed to decide the application of the petitioner in the light of

the observations made above.

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