

Smt. Dulari and ors. Vs. Ivth Additional District Judge and ors.

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Court : Allahabad

Decided On : Sep-26-2003

Reported in : 2004(1)AWC305

Judge : S.U. Khan, J.

Acts : Provincial Small Causes Courts Act, 1887 - Sections 23

Appeal No. : C.M.W.P. No. 4463 of 1991

Appellant : Smt. Dulari and ors.

Respondent : ivth Additional District Judge and ors.

Advocate for Def. : S.C.

Advocate for Pet/Ap. : Swaraj Prakash, Adv.

Disposition : Petition allowed

Judgement :

S.U. Khan, J.

1. Respondent No. 3 Dr. Ram Dulare Tripathi (R.D. Tripathi in short) purchased the property from Saraswati Devi through registered sale deed dated 24.8.1971. He himself was tenant in a small portion of the said property. He filed S.C.C. Suit No. 266 of 1982 against Ram Karan Jaiswal (R. Jaiswal in short) (since deceased

and survived by petitioners) before J.S.C.C. Gorakhpur), claiming therein that R. Jaiswal was tenant in a portion of the property purchased by him (R.D. Tripathi) on 24.8.1971 since before its purchase by him and that he (R. Jaiswal) had not paid rent since June, 1979. Relief for ejectment was sought on the ground of default. The suit was decreed by J. S.C.C. and the revision filed against the same was also dismissed hence this writ petition. Smt. Saraswati Devi, who executed the sale deed was wife of step brother of R. Jaiswal, i.e., Bhagwan Das (father of B. Das and R. Jaiswal was one their mothers were different).

2. The aforesaid sale deed dated 24,8.1971 was challenged through suits thrice, i.e.. in the years 1971, 1972 and 1973. In the year 1971 and 1973 the suits had been filed by R. Jaiswal himself. The first suit was dismissed in default and the other suit (O.S. No. 191 of 1973) was dismissed under Order VII Rule 11. In the year 1972 the suit was filed by the seller herself, i.e., Saraswati Devi against R.D. Tripathi being case No. 14 of 1972. The said suit was dismissed for non-payment of court fees as court fees was not paid after rejection of application of plaintiff of the said suit for permission to sue in forma pauperis. However, in the oral statement of R.D. Tripathi in the suit giving rise to the instant petition which is Annexure-3 to the supplementary affidavit he stated that in the suit filed by Smt. Saraswati Devi for cancellation of sale deed, both the parties entered into compromise. In the said statement he also stated that Smt. Saraswati Devi at that time was aged about 53-54 years and she was residing in the house even after the sale deed with his permission. In the said statement it had also come that B. Das husband of Smt. Saraswati Devi was also alive.

3. R. Jaiswal defendant pleaded that he was not the tenant but owner of the house in dispute. He also seriously questioned the ownership/ land lordship of R.D. Tripathi, J.S.C.C., who decreed the suit through judgment and decree dated 19.1.1988, held that after dismissal of 3 suits challenging the sale deed through which plaintiff of purchased the property it was no more open to the defendant to question the validity of the sale deed. However, it appears that the Court was basically concerned with the title of the plaintiff. The main thrust of the judgment is with regard to the title of the plaintiff and application of defendant for returning the plaint for filing before regular civil court under Section 23 of P.S.C.C. Act was also

rejected. As far as the finding to the effect that defendant was tenant is concerned the same may be described as only cursory. Plaintiff nowhere stated that the tenancy of defendant (R. Jaiswal) came into existence before him or that he ever saw R. Jaiswal paying rent to Smt. Saraswati Devi. Smt. Saraswati Devi and her husband Bhagwan Das were best witnesses to prove the tenancy ; however, they were not examined by the plaintiff even though in his oral statement, he stated that Smt. Saraswati Devi entered into compromise with him meaning thereby that she was not on hostile terms with him regarding sale of the property.

4. Sale deed was filed before the J.S.C.C. even though its copy has not been annexed along with writ petition or supplementary-affidavit or counter and rejoinder-affidavit. However, from the discussion of the sale deed by the courts below, it becomes quite clear in the sale deed, it was not mentioned that R. Jaiswal was tenant of a portion of the property sold. This was a very important evidence/circumstance which has completely been overlooked by J.S.C.C. Plaintiff respondent No. 3 stated that since the date of sale in the year 1971 till June, 1979, defendant regularly paid rent to him for which no receipt was issued and only an acknowledgment was made by the plaintiff in a copy of the defendant. When the defendant started challenging the sale deed dated 24.8.1971 just after its execution in the Courts (first suit filed in the year 1971 itself) it is improbable that he would be simultaneously paying rent to the plaintiff also regularly. Plaintiff also admitted that after execution of the sale deed, he did not give any notice demanding rent and intimating change of ownership to the defendant. The only notice given was in the year 1982 after 11 years of the sale deed. The case of tenancy in between R. Jaiswal and Smt. Saraswati Devi set up by the plaintiff was also highly improbable in view of close relationship between R. Jaiswal defendant and Smt. Saraswati Devi as her husband was step brother of R. Jaiswal. The revisional court, i.e., IVth Additional District Judge, Gorakhpur, dismissed the revision (Civil Revision No. 57 of 1988) directed against the judgment and decree dated 19.1.1988 passed by J.S.C.C., Gorakhpur in S.C.C. Suit No. 266 of 1982 through judgment and order dated 28.1.1991. The revisional court affirmed all the findings of the trial court.

5. In my opinion, the judgments by the courts below are perverse, erroneous in law and liable to be quashed as the above-mentioned evidence/circumstances were not taken into consideration while holding the defendant R. Jaiswal to be tenant.

6. Learned counsel for the petitioner, has argued that all the earlier suits challenging the sale deed dated 24.8.1971, were dismissed on technical grounds and not on merit, hence decision/order passed therein will not operate as res judicata in view of AIR 1996 SC 2367. Learned counsel for the landlord respondent has argued that in view of the dismissal orders passed in 3 suits, it was no more open to the defendant to challenge the sale deed. There is no necessity to decide this question in this writ petition as I have quashed the findings of the courts below on the issue of tenancy of R. Jaiswal and the matter is being remanded.

7. In normal course when it is held that the finding of J.S.C.C. on a question of fact is erroneous in law on the ground that J.S.C.C. did not take into consideration the relevant evidence and circumstances, proper course is to remand the matter to J.S.C.C. However, in the instant case, I do not consider appropriate to adopt that course. In view of serious dispute regarding each other's status in between the parties, I consider it as a fit case where the J.S.C.C. should have returned the plaint for presentation before regular civil court.

8, Under somewhat similar circumstances, Supreme Court in Budhumal v. Mahaveer Prasad, AIR 1998 SC 1772, adopted the same course. Suit of the alleged landlord against the tenant had been decreed by J.S.C.C. and Revisions before District Judge as well as High Court had been dismissed. Parts of paras 9 and 10 of the said authority are quoted below :

'9. It is true that Section 23 does not make it obligatory on the court of small causes to invariably return the plaint once a question of title is raised by the tenant. It is also true that in a suit instituted by the landlord against his tenant on the basis of contract of tenancy, a question of title could also incidentally be gone into and that any finding recorded by a Judge, Small Causes in this behalf could not be res judicata in a suit based on title. It cannot, however, be gainsaid that in enacting Section 23 the Legislature must have had in contemplation some cases

in which the discretion to return the plaint ought to be exercised in order to do complete justice between the parties. On the facts of the instant cases we feel that these are such cases in which in order to do complete justice between the parties the plaints ought to have been returned for presentation to a Court having jurisdiction to determine the title.....

10. In the result, both these appeals are allowed and the judgments and decrees of the courts below are set aside and the Judge, Small Causes is directed to return the plaints of these two cases for presentation to the appropriate court as contemplated by Section 23 of the Act.'

9. Accordingly, both the impugned judgments are quashed.

J.S.C.C., Gorakhpur, is directed to return the plaint of S.C.C. Suit No. 266 of 1982 for filing before regular civil court under Section 23 of P.S.C.C. Act. After filing the plaint before regular civil court the plaintiff-respondent is permitted to get the plaint amended and incorporate therein the alternative plea and relief of ejectment on the ground of title in case, Court does not find the petitioner, to be tenants. If plaint is amended, the petitioner-defendants will also be at liberty to file additional written statement taking the plea of adverse possession. It is needless to say that the questions of title of plaintiff and bar of res judicata, in view of dismissals of the suit filed in the years 1971, 1972 and 1973 will be decided afresh by the civil court without being influenced by the findings recorded by J.S.C.C. and revisional court.

10. Before parting, a word of caution-word 'improbable' has been used twice in the earlier part of this judgment' the same shall not be taken to be a finding by this Court. Word 'improbable' does not mean impossible. In this regard, a rule of logic is commended to the courts below ; 'whenever you have eliminated the impossible, whatever remains, however improbable, must be the truth'. Sir Arthur Conan Doyle from the mouth of his creature Sherlock Holmes in 'The sign of four'.

11. Accordingly, the writ petition is allowed. No order as to costs.