Rasheed Ahmad and ors. Vs. Smt. Kariman Khatton and ors.

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Court : Allahabad

Decided On : Aug-14-2001

Reported in : 2002(1)AWC346

Judge : Kamal Kishore, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Order 10, Rule 2; Code of Civil Procedure (CPC) , 1908 - Sections 100

Appeal No. : Second Appeal No. 933 of 1982

Appellant : Rasheed Ahmad and ors.

Respondent : Smt. Kariman Khatton and ors.

Advocate for Def. : S. Mirza and ;M.A. Khan, Advs.

Advocate for Pet/Ap. : Z. Silani, Adv.

Disposition : Appeal allowed

Judgement :

Katnal Kishore, J.

1. This is the second appeal against the Judgment and decree dated May 31, 1982 passed by the then learned Vth Additional District Judge, Hardoi, dismissing the appeal and confirming the judgment and decree passed by Munslf East.

Hardoi. In Regular Suit No. 113 of 1978.

2. The facts giving rise to this appeal are that the original plaintiff appellant had filed the suit for partition on the allegations that one Sheikh Angne had two wives and that Maula Bux plaintiff-appellant and lllahi Bux defendant-respondent are the sons of Sheikh Angne from the second wife. It is alleged that by means of oral gift, Sheikh Angne had in his life-time partitioned his whole property amongst his sons on 18.9.1932 and in accordance with each had come in the possession of the property so given and mutations in papers were also made. The plaintiff-appellant has in para 3 of the plaint mentioned the properties which were given to him (Maula Bux) and to the defendant Hahi Bux. It shows that Gondhar and Nalewala groves were given to the plaintiff and the defendant half and half and that in bangkala, the plaintiff and the defendant had 1/4 share each and that Jogin Ball grove was given to the plaintiff-appellant in full and that the property of beel and umrlya were given to the defendant-respondent in full and that house situate in Mohalla Maldanpura were given to the plaintiff and defendant half and half.

3. The suit was contested by the original defendant-respondent alleging that there has been no partition on 18.9.1932 and he denies that in the house in suit, the plaintiff has any share. He also denied that there was any partition on 18.9.1932 and any consequent mutation and alleged that the plaintiff has been in possession of the house. It is alleged that in Suit No. 21/47 of 1937 decided by learned Additional Civil Judge on 14.2.1938 family settlement of 18.9.1932 was disbelieved and that it is thereafter that Sheikh Angne had divided his entire property in the year 1941 wherein the disputed house came in the share of the defendant-respondent and he had been continuing in possession over it since then. He has been repairing and constructing it and that in any condition, he has completed his right ' by adverse possession in the house in suit. It is alleged that it was in the month of March, 1978 the plaintiffs son was given a room in the disputed house to stay and did not vacate it despite repeated requests and the present suit has been filed by the appellant alleging ownership rights in the house. It was also alleged that if the partition of 1941 is not believed then the plaintiff could not have half share in the house in suit and that the suit being for partial partition it cannot proceed. It is alleged that the suit is barred by estoppel and it is

bad for non-joinder of necessary parties. It was also alleged that the suit is barred by time.

4. After the full trial, the learned Munslf has dismissed the suit for partition with costs. In first appeal, the learned lower appellate court has dismissed the appeal and confirmed the judgment and decree passed by the learned Munslf. Feeling aggrieved, the plaintiffs-appellants have preferred this second appeal.

5. The following question of law has been formulated by this Court :

'Whether the Judgment of Suit No. 35 of 1938. Civil Appeal No. 16 of 1938, Misc. Case No. 17 of 1938 and Execution Decree Appeal No. 9 of 1939 could have the effect of undoing the family settlement of 1932 .....?'

6. I have heard the arguments of the learned counsel for the parties and gone through the records.

7. It has been argued by the learned counsel for the defendants-respondents that since there are concurrent findings of fact recorded by both courts below, the same cannot be interfered with in view of the ruling in Kondiba Dagadu Kadam v. Savitribai Sopan Gujar. 1999 (2) AWC 1608 (SC) : (1999) 3 SCC 722. No doubt, the above law laid down by Hon'ble Supreme Court about the concurrent findings of fact is good law and should ordinarily not be Interfered. However, there are two exceptions to this general rule :

(1) when there is perversity in the findings recorded by court below, and

(2) where the court below lacked inherent jurisdiction to try the suit, etc.

8. On the other hand, it has been argued by the learned counsel for the plaintiffs-appellants that since both the courts below have erred in giving their findings on the basis of inadmissible evidence, etc., the findings recorded by both courts below are vitiated and are liable to be set aside. I find substance in the arguments advanced on behalf of the plaintiffs-appellants.

9. Ordinarily, this Court does not go into findings of fact in exercise of its jurisdiction in Second Appeals decided by the High Courts under Section 100 of

the Code of Civil Procedure. But, in certain exceptional cases, this Court will not hesitate to interfere, if interference is called for and if the High Court has failed to Interfere under Section 100. After hearing the applicants in person and the learned counsel for the respondent, I am of the view that this is one of those exceptional cases in which Interference is called for even within the narrow parameters of Section 100, C.P.C.

10. Now under Section 100. C.P.C., after the 1976 amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so.

11. There are two situations in which Interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which. If considered would have led to an opposite conclusion. This principle has been laid down in a series of judgments of Hon'ble Supreme Court in relation to Section 100, C.P.C. after the 1976 amendment. In Dilbagrai Punjabi u, Sharad Chandra, 1988 Supp SCC 710 : AIR 1988 SC 1858, while dealing with a Second Appeal of 1978 decided by the Madhya Pradesh High Court on 20.8.1981. L. M. Sharma, J-, (as he then was) observed that :

The Court (the first appellate court) is under a duty to examine evidence on record and if it refuses to consider important evidence having direct bearing on the disputed issue and the error which arises as of a magnitude that it gives birth to a substantial question of law, the High Court is fully authorised to set aside the finding.' This is the situation in the present case.

12. In that case, an admission by the defendant-tenant in the reply notice in regard to the plaintiffs title and the description of the plaintiff as 'owner' of the property signed by the defendant were not considered by the first appellate court while holding that the plaintiff had not proved his title. The High Court interfered with the finding on the ground of non-consideration of vital evidence and this Court affirmed the said decision. That was upheld in Jagdish Singh v. Nathu Singh. (1992) 1 SCC 647 : 1992 AIR SCW 1747 : AIR 1992 SC 1604, with reference to a Second Appeal of 1978 disposed of on 5.4.1991, Venkatachaliah, J., (as he then was) held:

'Where the findings by the Court of Jact is vitiated by non-consideration of relevant evidence or by an essentially erroneous approach to the matter the High Court is not precluded from recording proper findings.' Again in Sundra Naickavedtyar v. Ramaswami Ayyar, 1995 Suppl (4) SCC 534 : 1993 AIR SCW 3978 : AIR 1994 SC 532. It was held that where certain vital documents for deciding the question of possession were ignored, such as a compromise, aft order of the revenue court relying on oral evidence was unjustified. In yet another case in Mehrunissa v. Visham Kumari. (1998) 2 SCC 295 : 1998 AIR SCW 3 : AIR 1998 SC 427, arising out of Second Appeal of 1988 decided on 15.1.1996, it was held by Venkataswami, J.. that a finding arrived at by Ignoring the second notice issued by the landlady and without noticing that the suit was not based on earlier notices, was vitiated and the High Court could interfere with such a finding. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. In Sri Chand Gupta v. Gulzar Stngh, (1992) 1 SCC 143 : 1991 AIR SCW 2813 : AIR 1992 SC 123, it was held that the High Court was right in interfering in second appeal, as has been held by Hon'ble Supreme Court in the ruling in Ishwar Dass Jain v. Sohan Lal. 2000 (1) AWC 2.1 (SC) (NOC) : AIR 2000 SC 426.

13. As to the jurisdiction of the High Court to reappreciate evidence in a second appeal it is to be observed that where the findings by the court of facts is vitiated by non-consideration of relevant evidence or by an essentially erroneous approach to the matter, the High Court is not precluded from recording proper findings as has been held by the Hon'ble Supreme Court in the ruling in Jagdish Singh v. Natthu Singh, (1992) 1 SCC 647. The same view has been taken by Hon'ble Supreme Court in another ruling also as in AIR 1987 SC 1484 that the erroneous findings of fact recorded by the court below can be set aside by High Court in second appeal.

14. The learned counsel for the appellant has placed reliance upon the statement recorded under Order X, Rule 2 on 27.2.1980, wherein it is alleged that the defendant-appellant has stated that there has been partition between the parties under which the property at Hardoi was given to the plaintiff-appellant and that

defendant-respondent had got the disputed house and since then he is the owner in possession of the disputed house and that since March, 1978 plaintiff's son was accommodated in the house, is conclusive. It is on this basis that the learned counsel for the appellant contended that this partition between the parties as has come in statement under Order X. Rule 2 is conctusiue against him for being admission under Order X, Rule 2 and for this he placed reliance upon Amrita Devi and Ors. v. Sripati Rai and Ors., AIR 1962 All 111. In the same volume at page 447, it has been held in Smr. Mango v. Prem Chand, that the statement under Order X. Rule 2 are intended for clarification of pleadings relating to the suit, the value of these statements cannot be set at naught by any subsequent tutored statement given in evidence. Accordingly, the oral evidence of the parties is to be scrutinised in accordance with the evidence of the parties and it is in that context that the statement under Order X, Rule 2 has to be read. In proof of partition dated 18.9.1932 as is alleged by the plaintiff-appellant the plaintiff has examined himself as P.W. 1, Ahsan All P.W. 2, Said Ahmad P.W. 3 and Abdulla P.W. 4. The statement of Maula Bux P.W. 1 is to the effect that it is in accordance with the details given in para 3 of the plaint that half portion of the disputed house was given to him by partition by oral gift by Sheikh Angne and that half portion in the house was given to the respondent Hahi Bux. He has stated that 'Quras' of the partition of 1932 were prepared and these documents are papers No. 73C and 74C, the priginal of which has been filed in some other suit.

15. In the Instant case, both the courts below have misunderstood the real point for determination in arriving at the findings of fact, hence the High Court could Interfere with the findings in second appeal as has been held by Hon'ble Supreme Court as in Kakumanu Pedasubhayya and Anr. v. Khokumanu Akkamma and Anr., AIR 1958 SC 1042.

16. Accordingly in view of the aforesaid rulings of Hon'ble Supreme Court since the findings recorded by both courts below are based on inadmissible evidence, etc., the same is liable to be set aside and the question of law formulated by this Court as mentioned above is answered in negative.

17. The second civil appeal is allowed. The Judgment and decree passed by both courts below are set aside. The suit for partition of half share in house in suit is hereby decreed with costs.