

Ajit Singh Vs. Sadhu Singh

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Court : Delhi

Decided On : Jan-21-2004

Reported in : AIR2004Delhi320; 110(2004)DLT125; 2004(73)DRJ99

Judge : Mukundakam Sharma, J.

Acts : Code of Civil Procedure (CPC) - Sections 10

Appeal No. : Suit No. 2195/1998

Appellant : Ajit Singh

Respondent : Sadhu Singh

Advocate for Def. : Navin Prakash, Adv.

Advocate for Pet/Ap. : S.K. Kalia, Adv

Judgement :

Mukundakam Sharma, J.

1. In the present suit filed by the plaintiff, pleadings were exchanged by the parties and were filed in this Court. On the basis of the said pleadings, several issues were framed by this Court by Order dated 18.2.2003. The first issue, which was framed on the pleadings of the parties, is as follows:

'Whether the suit is liable to be stayed under Section 10 of CPC?'

2. After framing the said issues it, was ordered that the said issue No. 1 would be treated as a preliminary issue and the said issue was set down for arguments. Accordingly, the said issue has been argued today by the counsel appearing for the parties, during the course of which they have not only taken me through the pleadings of the parties in the present suit but also through the pleadings in the suit No. 69/1984, which was re-numbered as suit No. 63/1992 and the judgment which was rendered in the said suit by the Additional District Judge. Incidentally the Suit No. 63/1992 was also between the same parties.

3. In Order to appreciate the contentions of the counsel for the parties, it would be necessary to set out certain facts leading to the filing of the present suit. The plaintiff herein claims to be the absolute owner of 21/2 storied property bearing No. L-59, Kalkaji, New Delhi. It is stated in the plaint of the present suit that the plaintiff with his own funds purchased plot No. L-59, Kalkaji, New Delhi in the year 1965 and thereafter constructed the ground floor of the said suit property. It is also claimed that subsequently the plaintiff also constructed the first floor and the barsati floors in stages and completed the entire construction of the ground floor, first floor and barsati floor in stages by the year 1976. It is contended that father of the defendants No. 1 to 5, and the husband of the defendant No. 6 and uncle of the plaintiff, died on 5.5.1972 when the defendants No. 1 to 6 were living at L-110, Kalkaji, New Delhi as tenant and that after the death of the father of the defendants No. 1 to 5, the defendants were in great financial distress and accordingly the plaintiff in June 1972 allowed the defendants to live as a licensee in a portion of the ground floor of his house bearing No. L-59, Kalkaji, New Delhi. It is also alleged that the first floor and the barsati floor were under the possession of the plaintiff and the said premises were let out by the plaintiff to a tenant, who vacated the said premises some time in 1991. It is stated that since the defendants avoided the subsequent request of the plaintiff and refused to vacate the ground floor of the premises, the plaintiff filed a suit in the District Court, which was registered as suit No. 69/1984 and subsequently re-numbered as suit No. 63/1992. The said suit was heard and tried by the Additional District Judge, Delhi and after completion of the trial, the said suit was decreed for recovery of possession of the ground floor of house No. L-59, Kalkaji, New Delhi in favor of the plaintiff and against the defendants with costs. However, the Additional District

Judge, who rendered the judgment and the decree on 30.9.1997 granted 30 days time to the defendants to hand over vacant possession of the said premises to the plaintiff. In the meantime, however, the said defendants filed an appeal, which is now pending for consideration in this Court being registered as RFA No. 329/1997. However, it is stated that during the pendency of the aforesaid suit, the defendants also forcibly entered into the first floor and the barsati floor of the property in question, namely, property No. L-59, Kalkaji, New Delhi and accordingly the present suit came to be filed by the plaintiff praying for the following reliefs:

(a) A decree for possession of half portion of the first floor and half portion of the Barsati floor of House No. L-59, Kalkaji, New Delhi and shown RED in the plan annexed to the plaintiff be passed in favor of the plaintiff and against the defendants;

(b) A decree for a sum of Rs. 5,91,840/- as damages/mesne profit and interest with pendente lite and future interest @ 24% per annum be passed in favor of the plaintiff and against the defendants;

(c) A decree for permanent injunction restraining the defendants from assigning, letting out parting with possession of any part or parts or creating any third party interest in the portions shown RED in the plan annexed as Annexure-A with the plaint.

(d) Directing an enquiry as to damages/mesne profits payable by the defendants to the plaintiff from date of the institution of the suit until:

(i) the delivery of possession to the plaintiff Decree Holder; or

(ii) The relinquishment of possession by the defendant judgment debtor with notice to decree holder through court; and

(e) Costs of the suit and such other and further relief which this Hon'ble Court deems fit and proper may kindly be granted to the plaintiff against the defendants.

4. The contesting defendants are defendants No. 1 to 5, who have filed a joint written statement. One of the issues that is raised in the said written statement is

that the suit is liable to be stayed in view of the provisions of Section 10 CPC, on the basis of which the aforesaid preliminary issue was framed by this Court.

5. Counsel appearing for the defendants No. 1 to 5 has submitted before me that the entire property namely house No. L-59, Kalkaji, New Delhi is a joint family property of the plaintiff and the defendants and, therefore, the defendants are co-owners in respect of the said property. It is also submitted that there is a family arrangement between the parties in terms of which the first floor and the barsati floors absolutely vested on the defendants and, therefore, the defendants have ownership and absolute right and title in respect of the said property. It is also sought to be contended that even otherwise the defendants have acquired a right by way of adverse possession in respect of the aforesaid property. These are the pleas that are raised by the defendants in their written statement. The counsel submits that these are also the issues which were urged in the earlier suit, which was filed by the plaintiff, and registered as suit No. 69/1984 and later on re-numbered as suit No. 63/1992. In the said suit a decree for recovery of possession of the ground floor of the property was passed. Counsel for the defendants, therefore, submits that the matter in issue in both the suits are the same and, therefore, the present suit is required to be stayed in the light of the provisions of Section 10 CPC. In support of his contention, the counsel has drawn my attention to the decision of this Court in Sagar Shamsheer Jung Bahadur Rana and another v. The Union of India and others : AIR1979 Delhi118 . Counsel also submits that the provisions of said Section 10 CPC are mandatory and, therefore, there is no other option for this Court but to stay the proceedings in the present suit by applying the provisions of Section 10 CPC.

6. Counsel appearing for the plaintiff, however, voluntarily refutes the aforesaid submission of the counsel for the defendants. It is submitted by the counsel for the plaintiff that all the aforesaid contentions, which are sought to be raised that the property is a joint family property and that the defendants have acquired right by way of adverse possession were urged also by the defendants in respect of the ground floor of the property. It is also submitted that so far the first suit is concerned, the said suit was filed as the defendants refused to vacate the ground floor of the property bearing No. L-59, Kalkaji, New Delhi, which was the suit

property in the said suit even in spite of the fact that they were inducted thereto only as licensees. He has submitted that so far the present suit is concerned, the same was filed during the course of the trial of the first suit in view of the fact that some time in 1993 the defendants forcibly entered into the said first floor and the barsati floor, which compelled the plaintiff to file the present suit seeking for the reliefs as set out in the said suit. Counsel for the plaintiff therefore, submits that it cannot be said that the matter in issue in both the suits is same. He also submits that there is no identity of either the subject matter or the issues of the two suits.

7. I have heard the counsel appearing for the parties and have considered the pleadings and the records very carefully in the light of the submissions made by the counsel appearing for the parties. The earlier suit is admittedly filed by the plaintiff against the defendants in respect of the ground floor portion of the property No. L-59, Kalkaji, New Delhi. The contention in the said suit was that the plaintiff inducted the defendants, who are cousin brothers of the plaintiff, as Licensees as at that relevant point of time when they were given shelter in the said premises, they were undergoing financial distress because of the death of their father, who was the uterine brother of the father of the plaintiff. The judgment and the decree that was passed by the Additional District Judge, Delhi in the other suit, namely, suit No. 63/1992 was only in respect of the ground floor of the property bearing No. L-59, Kalkaji, New Delhi. So far the present suit is concerned, the plaintiff was compelled to file this suit as according to the plaintiff the defendant forcibly entered into possession of the first floor and the barsati floor some time in 1993. The defendants in their written statement filed in the present suit have stated in paragraph 11 that in the first week of April 1993, the plaintiff out of his own volition, voluntarily and having realised the mistake handed over the vacant possession of the first floor and the barsati floor to the defendants and had also assured the defendants to withdraw the suit pending before Tis Hazari, Delhi, but later on he resiled from the said assurance. The aforesaid facts clearly disclose and also establish that the suit property in the present suit is absolutely distinct and separate from that of the earlier suit. The issues that are also being raised in the present suit cannot be said to be identical in view of the fact that the contention that is raised in the present suit is that the defendants forcibly entered into the possession of the first floor and the barsati floor whereas according to the

defendants possession of the said floors was given by the plaintiff to the defendants of his own volition with a further statement that he will withdraw the suit, which is pending in the Tis Hazari Courts, namely, suit No. 63/1992. thereforee, it cannot be said that the matters in issue in both the suits are identical.

8. Besides, the relief which is sought for by the plaintiff herein is a decree for recovery of possession of the first floor and the barsati floor of the premises in question. The said relief would not be available and could not be given to the plaintiff automatically and on the basis of the decree which is already passed even when the same is upheld by the appellate court. In the subsequent suit, the plaintiff has also claimed for mesne profits and damages, which are also not issues, which had arisen for consideration in the earlier suit. The provisions of Section 10 of the Code of Civil Procedure would apply when decision in one suit would non-suit the other suit. Only in that event it could be said that the matter in issue in both the suits are directly and substantially the same. It also cannot be said that the whole of the subject matter in both the suits is identical. It is true that some of the issues which would arise for consideration could be identical but not all the issues. There is no identity at all with regard to the cause of action and the suit property and also the reliefs that are sought for. The decision of this Court in Sagar Shamsheer Jung Bahadur Rana and another v. The Union of India and others (supra) is distinguishable on facts. The ratio that is laid down in the said decision was rendered in the context of the facts of that case. It is also clear from a reading of the said judgment that this Court while deciding the said case applied the principles of *res judicata* for stay of the suit. In the said proceedings the plea of *res judicata* was specifically raised by the defendant whereas in the present suit the defendants have not raised the plea of *res judicata* specifically and, thereforee, in my considered opinion the ratio of the said decision is not applicable to the facts of the present case. The plaintiff in the said suit, which was stayed, claimed recovery of Rs. 18 lacs on account of principal amount and interest by sale of the mortgaged property. The present suit is, however, filed for decree for recovery of possession and for damages and mesne profits, which relief cannot be said to be identical with that of the relief sought for in the suit No. 62/1993.

9. In my considered opinion, therefore, the provisions of Section 10 CPC are not applicable to the facts and circumstances of the present case. The issue is decided accordingly in favor of the plaintiff and against the defendants. The suit shall now proceed in respect of the other issues in accordance with law. The other issues which were framed by Order dated 18.2.2003 shall now be tried. The parties herein shall file their list of witnesses and also additional documents, if any, within three weeks. The matter shall be listed before the Joint Registrar on 19th February, 2004, for scrutiny and for admission/denial of documents. The parties shall also lead their evidence in the nature of examination-in-chief by filing affidavits, which shall be filed by the plaintiff within eight weeks and the defendants will file the same after expiry of six weeks thereafter. It is, however, made clear that the witnesses, who file their affidavits by way of examination-in-chief, shall be made available for their cross-examination. Such cross examination shall be done by appointing a Local Commissioner. I accordingly appoint Mr. Ravinder Kumar Trakru, FC 111, Tagore Garden, Delhi - 44 as the Local Commissioner to record the evidence in the present suit. He shall be paid his remuneration in accordance with the schedule of fee approved by this Court, which shall be shared equally by the parties.

10. The matter shall be listed before the Local Commissioner on 19th May, 2004.