Sultan and ors. Vs. Ganesh and ors.

Sultan and ors. Vs. Ganesh and ors.

SooperKanoon Citation : sooperkanoon.com/762962

Court : Rajasthan

Decided On : Feb-07-1986

Reported in : 1986(2)WLN729

Judge : Inder Sen Israni, J.

Appeal No. : S.B. Civil Second Appeal No. 267 of 1981

Appellant : Sultan and ors.

Respondent : Ganesh and ors.

Advocate for Def. : Mr. O.P. Garg

Disposition : Appeal dismissed

Judgement :

Inder Sen Israni, J.

1. This is a civil appeal filed by the defendants appellants against the judgment and decree dated 21-9-1981 of learned Additional Distt. Judge No. 1, Jaipur City, by which the judgment of Addl. Munsif (West) Jaipur City was affirmed and the suit of the plaintiffs-respondents for possession and rent was decrred.

2. Briefly stated the facts of the case are that the plaintiff-respondents purchased a plot No. 5-11 measuring 50x90' in Rambabu-ka-Aahata, situated at Station Road,

Jaipur, which is now known as the Sen Colony. After the death of Rambabu Sen, his son K.K. Sen became the owner of colony, the land was divided into plots and the scheme was approved by the Municipal Council. Father of the present appellants, Sultan and plaintiffs were living in Rambabu-ka-Aahata as tenants. Late Johari took on rent a piece of land from K.K. Sen and executed a rent note on 23-1-1949, which came into force from 1-1-1949 and was registered on 18-2-1949. Shri K.K. Sen executed a registered sale-deed dated 15-4-1957 in favour of the plaintiffs. Therefore, the appellants become tenants of the respondents from 15-4-1957. The plaintiffs wanted to build a house for themselves on the disputed land. However, the appellants claimed to be the owners of the land. Therefore, the respondents filed a suit for permanent injunction against the defendants-appellants, which was subsequently withdrawn on 6-7-1967. Thereafter the plaintiffs respondents filed the present suit for declaration praying that it may be declared that the plaintiffs were the owners of plot bearing No. A- 11 in the Sen Colony and that the possession of such portion, which was in occupation of the defendants appellants be given to them and the rent and damages may also be awarded to them. The appellants in their written statements asserted that they were not the tenants of K.K. Sen or any other person and K.K. Sen had no right to sale the plot and also claimed adverse possession of more than 12 years and prayed that the suit of the plaintiffs be dismissed. Learned trial court flamed as many as 9 issues after recording the evidence of both the parties and decreed the suit of plaintiffs and held that the defendants-appellants were the tenanis of K.K. Sen & a decree of possession & rent was passed in favour of plaintiffs-respondents. The defendants-appellants preferred an appeal in the court of learned Addl. Distt. Judge No. 1, Jaipur City, who confirmed the decree of the trial court and dismissed the appeal filed by the defendants appellants. There after the defendants-appellants preferred this civil second appeal, which came up for admission and was heard on 17-11-1981. In the memo of appeal as many as 11 substantial questions of law, were mentioned. The substantial question of law which was framed by the Court is as under:

Whether the defendants apellants can law fully be deemed to be in occupation of that area of the land in dispute, which is covered by the lease created in their favour on January, 23, 1949 as tenants under law ?

The court did not frame any other substantial question of law as framed by the learned counsel for the appellants and mentioned in the memo of appeal.

3. An application dated 12th March, 1982 under Section 100 read with Section 151 CPC was filed on behalf of the appellants praying that the appellants may be permitted to argue on all substantial questions of law as mentioned in the memo of appeal.

4 Learned counsel for the appellants Mr. D.L. Bardar at the time of arguments asserted that the court had wide powers to hear other substantial question of law apart from the one framed by the court at the time of admission of the appeal, as is clear from proviso to Section 100(5) CPC after recording the reasons for doing so. It has been argued that these questions are important for proper and just decision of the appeal and it will be in the interest of justice to permit the appellants to argue on the questions of law as mentioned in the memo of appeal.

5. Mr. O.P. Garg, learned counsel for the respondents on the other hand has vehemently opposed this application on the ground that all these substantial questions of law which were mentioned in the memo of appeal by the appellants were argued before this court at the time of admission. The court after hearing both the sides came to the conclusion that the appeal deserves to be admitted only on one substantial question of law and that other so called substantial questions of law were rejected as is evident from the order sheet dated 17-11-1981.

6. I have learned counsel for both the parties on this point. It is evident from a recording that Sub-section (5) of Section 100 CPC shall be deemed to take away or abridge the power of the court to hear the appeal on any other substantial questions of law, which may not have been formulated by it, if it is satisfied that the case involves such questions. However, this is a civil second appeal and under the amended provisions of Section 100, a second appeal shall lie to the High Court only if the court is satisfied that the case involves a substantial question of law. Therefore, the civil second appeal shall be heard only on substantial questions of law and not on any such question which may involve questions of facts and mixed question of facts and law, In the present appeal, all the questions of law as framed

by the appellants and mentioned in the memo of appeal were heard by the court at the time of admission and after hearing both the parties, the court came to the conclusion that this appeal involves only one substantial question of law and the appeal was admitted for deciding this one substantial question of law. Once the matter was decided after hearing both the parties, in my considered opinion such questions of law, which were once heard and rejected by the court cannot be considered again at the time of arguments. If the appellants had raised any new questions of law which according to them were involved in the appeal, then the court could have considered the matter and decided whether such substantial questions of law were necessary to be formulated for just and proper decision of the appeal. No new questions of law have been argued and only such question of law have been re-agitated, which were once heard and rejected by the court at the time of admission. I, therefore, disallow this application and confine myself to the consideration of only one substantial question of law, which has been formulated by the court.

7. The only matter that needs consideration is that the appellants who are in occupation of that area of land in dispute, which is not covered by the lease deed executed by them on January 23-1 1949 are occupying the same as tenants under law and the respondents are entitled to get possession of this area of the land in dispute in these proceedings.

8. Learned Counsel for the defendants-appellants has drawn my attention to paras 2 to 6 of this plaint and has argued that the plaintiffs-respondents have not mentioned in these paras that the appellants were in occupation of the disputed plot as tenants of the same. He has also stated that in sale deed (Ex. 2) which has been executed, by which the plaintiffs purchased plot in dispute, it is mentioned that the plot is in possession of the purchaser. It is therefore, argued that since the purchasers were in possession of the disputed plot at the time of purchase, the appellants could not occupy the same as tenants in the same plot. In proceedings initiated at the complaint of appellants against plaintiffs, Sultan in his statement Ex. D. 8) has admitted that he was tenant in plots No. 10 & 11 Johari father of Sultan has also admitted in his statement (Ex-D9) that he was tenant of K.K. Sen in plots No. 10 and 11. It is admittedly the appellants that they occupied a portion of land

measuring 30'x20' in Rambabu-ka Aahata, which was subsequently named as the Sen Colony, when K.K Sen divided the land into plots and got the same sanctioned from the Municipal Authorities. It is quite possible that when the land was cut into plots in a scheme of putting up a colony the land occupied by the defendants-appellants came in parts of more than one plots.

9. The plaintiffs in para No. 6 of the plaint have clearly stated that since the defendants-appellants were occupying a portion of the land in Rambabu-ka-Aahata as tenans; they had occupied more area than what was gives on rent for their use and occupation. A map has also been produced along with the plaint, in which the portion of the disputed land in the plot A-11 purchased by the plaintiffs from K.K. Sen is shown in red lines and marked A B C G F H and the measurement of the same have also been mentioned in this para. Therefore, it cannot be said that no mention of the land in occupation of the defendant, in the plot purchased by the plaintiffs has been made.

10. Learned counsel for the respondents has drawn my attention to the provisions of Section 108, specially sub- Clause (d) of the Transfer of Property Act, which lays down that during the continuance of the lease if any accession is made to the property, such accession shall be deemed to be comprised in the lease. Similar will be the position regarding occupation or encroachment on any excess land belonging to the landlord. In the present case, the defendants appellants are in occupation of a portion of land in excess of what was rented out to them, which now forms part of plot No. A-11, which has been sold by the original owner K.K. Sen to the respondents.

11. In Mohd. Ahmed Amoliva v. Nirmal Chand Rai and Ors. AIR 1978 Cal., it has been held that when a tenant encroaches on the land outside his tenancy, but belonging to his landlord, he cannot acquire absolute title there to by adverse possession, but obtain only that right of tenancy under his landlord.

12. In Chapi Bhai Dhanji Bhai v. Purushottam 1971 RCJ 441 their lordships of the Supreme Court have held that under Section 108(d) of the TP Act, if any accession is made to the leased property during the continuance of the lease, such accession is deemed to be comprised in the lease if any accession is by

encroachment by the lessee and the lessee acquires there by prescription, he must surrender such accession to get or with the leased land to the lessor at the expiry of the term. The presumption is that the land so encroached upon is added to the tenure and forms part thereof for the benefit of the tenant so long as the lease continues and after ward for the benefit of the landlord.

13. It is, therefore, clear that according to law the defendants-appellants, who are in occupation of an area of the land purchsed by the plaintiffs-respondents on which they have encroached, as they were tenants of K.K. Sen they can claim no right or title on account of adverse possession as they had made only encroachment on this portion of the land while they were tenants of K.K. Sen. The learned first appellate court had, therefore, rightly decided issue No. 2 which was framed regarding this dispute.

14. In the result the judgment and decree passed by the first appellant court is upheld and the appeal filed by the appellants is dismissed with costs.