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Court : Himachal Pradesh

Decided On : Jul-07-1949

Reported in : AIR1949HP4

Appellant : Haroo

Respondent : Man Dass and ors.

Judgement :

ORDER

Bannerji, J.C.

1. This is an application in revision under the provision of para. 35 of the Himachal Pradesh (Courts) Order 1948, against a judgment and decree dated 25th May 1949, of the District Judge, Mahasu, reversing a judgment and decree of the Senior Subordinate Judge, Jubbal, dated 28th December 1948, and thereby decreeing the suit.

2. Man Dass, Kesru, Jhina and Jhia are four brothers, owning the field Khasra No. 4808. They commenced the suit for a declaration of a right of way over the land Khasra No. 4799, belonging to the defendant, Haroo. They claimed this right founded on prescription.

3. The defendant denied this right and resisted the suit mainly on the ground that no right of way was either granted or came into existence by long user.

4. This suit was brought on 17th January 1946. This date is important because it is previous to the date when certain enactments were put in force in Jubbal State. On 17th September 1946, it is admitted by the parties that the Limitation Act was put in force and in the notification, it was specifically announced that it would not apply to the pending cases. Therefore, the suit, which was in the nature of an easement, was not governed by the provisions of the Limitation Act. The Easements Act was introduced in Jubbal State by the Notification dated 17th September 1946, long after the institution of the suit. In the circumstances, on this ground alone, the suit should have been dismissed.

5. On merits too, this suit has no substance. Para. 4 of the plaint sets out that all the four brothers have and claim this right of way. But the plaint was signed and verified by three brothers, Man Dass, Kesru and Jhinu and it was alleged in that paragraph that Jhia was not available at the time the plaint was presented, he was consequently made a pro forma defendant. During the progress of this suit, Jhia was present but he did not apply to transpose himself into the position of a plaintiff. Further, when three brothers, Man Dass, Kesru and Jhinu, appealed against the decree dismissing their suit, they were the three appellants only. Jhia did not take any part in the appeal nor was he mentioned in the Memorandum of Appeal. He was not served with notice nor was there appearance on his behalf. Indeed, the judgment and decree of the appellate Court, setting aside the decree of the Court of first instance, does not mention Jhia, who according to the plaintiff's own admission has much interest in the servient tenement over which the right of way is claimed. Therefore, the decree which the appellate Court passed could not be effective so far as he is concerned. There is an important decision of a Division Bench of Calcutta High Court, Haran Sheikh and Ors. v. Ramesh Chandra and Ors. A.I.R.1921 Cal.622, in which the facts and circumstances were on all fours of the present case. In that case, one Panindra Narain Choudhury claimed interest in the servient tenement as Jhia does in the present case. The position in this appeal is that the appellate Court has made a declaration with full knowledge that Jhia, one of the persons interested in the servient tenement, was not an appellant or respondent before it. In the words of Mookerjee A.C.J.

it is plain that the Court will not entertain a suit in which no effective decree can be made in the absence of an interested party. Similarly, in a case like the present, where the decree is to be made for declaration of a right of way as a village road over the disputed land and for removal of an obstruction thereon, If it is discovered that a person interested in the servient tenement has not been made a party to the suit, the Court will not proceed to make a decree. The decree, if made, must be infructuous; if a suit is instituted by the absent person for an injunction to restrain the successful plaintiff from executing the decree, there will be no possible answer to the prayer. We are consequently of opinion that in the present case when the Court was apprised that the person named was interested in the servient tenement, steps should have been taken by the plaintiff to bring him before the Court.

In this case there is no dispute that Jhia is a person interested in the servient tenement or the land belonging to the defendant, Haroo. He was neither an appellant nor a respondent in the lower appellate Court and therefore, the decree which the learned appellate Judge made in favour of the three appellants, is infructuous and in my opinion, should be set aside.

6. The above grounds are sufficient to allow the application. But it is necessary that I should point out that there are other matters vital to the suit, which were not properly considered by the learned appellate Judge. None of the plaintiffs came to the witness-box, when, by an order of the learned Chief Judicial Officer in a revision, a remand was made of the case for trial by the Subordinate Judge, declaring that Shri Mohan Lal, Magistrate, Subordinate Judge, was not competent to try it. The plaintiffs did not only not offer themselves for cross-examination but they adopted a curious method of summoning the defendant to depose on their behalf. When a party is ordered by a Court to re-appear and submit to examination and cross-examination but he never cares to enter into the witness-box and deliberately keeps away, the Court is justified in drawing an inference unfavourable to his case. A party runs a great risk if he does not; enter into a witness box and himself give evidence in his case which is directly in his knowledge and which relates to the matters in controversy. (See *Sardar Gurbaksh Singh v. Gurdial Singh* 0049/1927 and *Darga Kunwar v. Mathura Kunwar* 15

7. Further, where the plaintiff refrains from giving evidence in his own behalf and adopts instead the tactics of calling the defendant as a witness for the plaintiff with the usual result that important features of the plaintiff's case were denied by the defendant, the Privy Council condemned this procedure. In *Shatrugan Das v. Sham Das*, Sir George Rankin, in delivering the judgment of the Board observed:

Mahabir Das, the plaintiff, refrained from giving evidence on his own behalf. He adopted instead the tactics of calling Sham Das, defendant 1, as a witness for the plaintiff, with the usual result that important features of his case are denied by his own witness. Their Lordships have on previous occasions condemned this practice. They think that the plaintiff's allegations as to custom are inconsistent.

8. The learned District Judge has discussed all the available evidence but the evidence that was vital to the case, was completely left out, Kewal Ram, P.W. 13, giving evidence for the plaintiffs, clearly stated that no such right existed and even if it did, it was not utilized or taken advantage of. Further in discussing the entire evidence, the learned District Judge erred in law as the evidence disclosed that in Jubbal no such right was known. Such right can only be created by grant. The attention of the learned District Judge was not drawn to the list of the enactments in force in Jubbal State. None of the witnesses for the plaintiff ever definitely asserted that such a right of way was ever known or claimed before the Easements Act came into force after the institution of the suit.

9. Sari Thakur Dass, counsel for opposite party, drew my attention to the several decisions of the Privy Council, namely, *Bassi Ram v. Ram Rattan*; *Venkata Kumar v. Secretary of State* A.I.R.1929 P.C.152; *Ramji v. Rao Kishore Singh* A.I.R.1929 P.C.190; and *Nafar Chandra Pal v. Sukkur Sheikh* A.I.R.1918 P.C.92, wherein their Lordships laid down the principle that the decision of an appellate Court should not be lightly interfered with. What their Lordships meant was that when the decisions of the appellate Court are based on facts proved by the testimony of witnesses and the decision is not contrary to law, they will be binding on the highest Court. In this case the only fact that went to the root of the case was whether any such right can be claimed on basis of long user before the 17th

September 1946. This was a question of law. The appellate Court failed to determine the basic question of fact and in my opinion, committed a serious error of law. (See Shaik Rahmat Ilahi v. Md. Hayat Khan .

10. In the circumstances, I hold that the plaintiffs never possessed this right when such rights could not be claimed in Jubbal State before 17th September 1946. I shall, therefore, allow the application in revision and set aside the judgment and decree of the District Judge, Mahasu, and restore the judgment and decree of the Senior Subordinate Judge, Jubbal and dismiss the suit. The order staying the execution will stand vacated. The plaintiffs (1) Man Dass, (2) Kesru and (3) Jhina, must pay the costs here and in the Court of first instance.

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