

Krishan Dev Vs. Smt. Ram Piari

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Court : Himachal Pradesh

Decided On : Jun-20-1964

Reported in : AIR1964HP34

Judge : Om Parkash, J.C.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Section 115 - Order 41, Rule 22

Appeal No. : Civil Revn. No. 10 of 1963

Appellant : Krishan Dev

Respondent : Smt. Ram Piari

Advocate for Def. : M.L. Aukta, Adv.

Advocate for Pet/Ap. : Tek Chand, Adv.

Disposition : Revision dismissed

Judgement :

ORDER

Om Parkash, J.C.

1. This revision-petition is directed against a decree of the learned District Judge, Mahasu, whereby, as a result of variation of a decree of the learned Senior Subordinate Judge, Mahasu, the respondent was granted a decree for possession

of a site, after removal of the structures, put up by the petitioner.

2. The respondent had brought a suit for possession of a portion of the site, comprised in Khasra No. 19, situated in bazar Badah (popular ly known as Dhali bazar, a suburb of Simla), after demolition of the structures, put by the petitioner, and for the issue of a permanent injunction. The allegations of the respondent were that the site, in dispute, which was previously comprised, in Khasra Nos. 107 and 108, village Badah, was owned by M/S. Darbari Lal Vasu Dev, and was purchased by her husband, on the basis of a registered sale-deed dated 30-7-1957, that her husband had transferred the site in her favour, that the petitioner was a sub-tenant of the land adjoining the site, that the petitioner had built a Dhara and a stair-case on the land under his sub-tenancy and had, while doing so, illegally encroached upon, a portion of the site. The respondent prayed that she may be granted possession of the portion of the site, illegally encroached upon, by the peti-tioner, and he may be permanently restrained, bythe issue of an injunction, from interfering with her possession.

3. The petitioner denied that he had en-croached upon any portion of the site, belonging to the respondent. He pleaded that he had put up structures on his own land which he had purchased from Satya Pal. The petitioner, further, pleaded, that even if it be found, that any structures, put up by him, were on the site, belonging to the respondent, she was not entitled to get the structures demolished, as she had acquiesced in their construction.

4. The learned Senior Subordinate Judge Mahasu held that the petitioner had encroached, by putting up structures, upon a portion, measuring 132 sq. feet, of the site, belonging to the respondent. But he did not order demolition of the structures and did not grant possession of the portion, encroached upon, to the respondent, as in his opinion, the balance of convenience lay in favour of the petitioner and ends of justice would be met if the respondent was awarded compensation. Accordingly he granted the respondent a decree for Rs. 300/-, as compensation for the portion, encroached upon, and also issued a permanent injunction, against the petitioner restraining him from interfering with the possession of the rest of the site.

5. The respondent did not feel satisfied with the award of compensation. She went up in appeal to the District Judge, Mahasu, and claimed possession of the portion measuring 132 sq. feet, illegally encroached upon, by the petitioner, after removal of the structures. The petitioner did not file any appeal or cross-objections, against the decree of the Senior Subordinate Judge. But in the appeal, filed by the respondent, it was contended, on his behalf, that the finding of the Senior Subordinate Judge, that the portion, measuring 132 sq. feet of the site, belonged to the respondent, was incorrect and that, that portion in fact, formed part of the land belonging to him. The learned District Judge did not permit the petitioner to raise this contention and to question the finding of the learned Senior Subordinate Judge about the ownership of the portion, in dispute. The reason, given was that, in the absence of a cross-appeal or cross-objections, the petitioner could not challenge the finding about the ownership of the portion of the site, in dispute.

6. The learned District Judge accepted the appeal of the respondent, and after setting aside the order, about the award of compensation, granted her a decree for possession of portion, measuring 132 sq. feet, of the site, in dispute, after removal of the structures. The petitioner has come up in revision against the decree of the learned District Judge.

7. The learned counsel for the petitioner contended that the learned District Judge, in not permitting the petitioner to question the finding of the learned Senior Subordinate Judge, about the ownership of the portion, in dispute and in not recording a finding about the title of that portion, has failed to exercise jurisdiction vested in him. The argument of the learned counsel was that, under Order 41, Rule 22 C. P. C., the petitioner was entitled to support the decree of the learned Senior Subordinate Judge on any of the grounds, decided against him, without filing any appeal or cross-objections and that by contending that the portion, in dispute, did not belong to the respondent, he was doing nothing more than to support the decree on a ground, decided against him. The contention of the learned counsel does not appear to be sound. It is, no doubt, true that a respondent is entitled under Order 41, R. 22 C. P. C., to support the decree on any of the grounds, decided against him, in the Court below. But, in the instant case, the petitioner was not supporting the decree of the learned Senior Subordinate Judge, by questioning

the finding, about the ownership of the portion, in dispute. On the other hand, by doing so, he was challenging the very basis of the decree.

The decree for the issue of an injunction and the award of Rs. 300/-, as compensation, was based on the finding that the portion, in dispute, belonged to the respondent. By challenging the ownership of that portion, the petitioner was attacking the decision of the learned Senior Subordinate Judge and was not supporting it. He could not do so under Order 41, R. 22 C. P. C., without filing cross-objections. In this connection the observations, made in *Sri Ranga Thathachariar v. Sri-nivasa Thathachariar*, AIR 1927 Mad 801, may be cited with advantage:--

'But when the relief granted depends upon the adjudication by the lower Court with respect to rights or causes of action, it is inconceivable that such decision or adjudication should be sought to be attacked in the appellate Court without any notice whatever to the other party. Though the word 'decree' has been used in R. 22, it is clear that what the rule contemplates really is the decision by the Court below and merely enables the decision arrived at by the lower Court to be supported on grounds other than those on which the lower Court proceeded. We are satisfied that under that rule it is not open to a respondent to have adjudicated by the appellate Court rights or causes of action which have been decided against him in the Court below and in respect of which he has filed no appeal or memorandum of objections'. Page 804.

8. AIR 1927 Mad 801, *supra* was overruled in *G. C. Venkata Rao v. K. Satyanarayanamurthy*, AIR 1943 Mad 698 (FB), wherein it was held that under Order, 41, R. 22 C. P. C., it is open to a defendant-respondent who has not taken any cross-objections to the partial decree passed against him, to urge in opposition to the appeal of the plaintiff, a contention, which if accepted by the trial Court, would have necessitated the total dismissal of the suit. I would, however, respectfully, follow and adopt, the principle enunciated, and the reasonings given, in AIR 1927 Mad 801, which was relied upon in *Kishen Kishore v. Din Muhammad*, AIR 1929 Lah 684.

The facts in the Lahore case were that the plaintiff had instituted a suit for possession of land and the well which stood on it. The defendants denied that the plaintiff was the owner of the land and averred that the land and the well was waqf property. The trial Court granted the plaintiff a declaration that he was the owner of the land, but, at the same time, it declared that the well and the land was waqf property by user. The plaintiff appealed against the decree. The defendants did not file any appeal or cross-objections. But in the appeal, filed by the plaintiff, they sought to attack the conclusion of the trial Court that the plaintiff was the owner of the property. The High Court did not allow the defendants to raise the question of ownership of the property on the ground that what the defendants sought to do was not to support the decree but to attack it.

Hardi Ram v. Kali Prasad Singh, AIR 1949 Pat 79 is another authority which has got a material bearing on the question to be decided in the instant case. The facts in that case were that in a suit for ejectment, against the defendant and his mortgagees, the defendant pleaded that his father had taken settlement of the land from the previous proprietor or alternatively that he had acquired a good title by adverse possession. The trial Court negatived the plea of the defendant but it did not grant the plaintiff a decree for ejectment on the ground of defect of parties. The plaintiff was given merely decree for damages for use and occupation against the defendant. The plaintiff appealed; the defendant did not. But in the appeal, filed by the plaintiff the defendant sought to reopen the question of title. The High Court did not permit the defendant to re-open the question in the absence of a cross appeal. It was held that in seeking to challenge the decision as to title, the defendant was, in effect, challenging the decree against him, which was a decree for damages, based on an adjudication, that he had no title and that he was a mere trespasser and that Order 41, R. 22 C. P. C., enables the respondent only to support the decree upon such grounds, decided against him, and not to challenge it.

To the same effect is *Secretary of State v. Chimanlal Jamnadas*, AIR 1942 Bom 161, In that case, the plaintiffs had instituted a suit for a declaration that they were the absolute owners of the property and for the issue of an injunction, restraining the Government from taking vacant possession of the land after removal of the

superstructures. The plea of the Government was that it was the owner of the land. The trial Court held that the plaintiffs had failed to prove that they were the owners of the land. But on account of their long possession, the trial Court granted the plaintiffs a declaration that they were entitled to continue in possession and enjoyment of the land. The plaintiffs did not file any appeal against the decision of the trial Court. The Government filed an appeal. It was urged, on behalf of the plaintiffs, in that appeal, that they were the absolute owners of the land and that the trial Court was in error in holding to the contrary. The High Court did not permit the plaintiffs to question the finding about the ownership, in the absence of any cross-objections.

9. The learned counsel for the petitioner, relied upon AIR 1943 Mad 698 (FB) supra, which over-ruled AIR 1927 Mad 801. I have already indicated that I would respectfully follow the principle laid down in AIR 1927 Mad 801. Another ruling, Gendalal v. Nanalal, AIR 1956 Madh Bha 58, relied upon by the learned counsel, for the petitioner, simply followed AIR 1943 Mad 698 (FB). Pannu Jeegania v. Dewi Prashad Sukh Chand AIR 1963 Madh Pra 15, cited by the learned counsel, for the petitioner, is distinguishable inasmuch as the suit in that case was totally dismissed by the trial Court, while in the instant case, the suit was partially decreed.

10. For the reasons, stated, in the earlier part of this order, I am of the opinion, that in the absence of an appeal or cross-objections, on behalf of the petitioner, the learned District Judge was not in error in not permitting him to re-open the question of title of the portion, in dispute, which had been decided against him by the learned Senior Subordinate Judge and that there was no failure to exercise jurisdiction.

11. It was, next, contended, by the learned counsel for the petitioner, that the learned District Judge acted with material irregularity in the exercise of his jurisdiction in decreeing the possession of the portion, in dispute, after removal of the structures. This contention of the learned counsel is without any substance. The portion, measuring 132 sq. feet, encroached upon, belonged to the respondent. She was entitled to get a decree for possession of that portion unless

there were some special circumstances, depriving her of that right. It was urged, on behalf of the petitioner, that the predecessors-in-interest of the respondent, or she herself, had not objected to the putting up of the structures and had, thus, acquiesced in their construction and she was not therefore, entitled to get possession but was entitled to get compensation, only.

There is not an iota of evidence, on record, that the predecessors-in-interest of the respondent, or she herself, had acquiesced in the construction of the structures, put up by the petitioner. The word 'acquiescence' is used in two senses; sometimes it is used to denote conduct which is evidence of an intention by a party, conducting himself, to abandon an equitable right; sometimes to denote conduct from which another party would be justified in inferring such an intention : vide *Murarilal v. Balkisan* AIR 1926 Nag 416. In the instant case, there is absolutely no evidence that the respondent, or her predecessors-in-interest, had ever encouraged the petitioner to put up structures or had consented to his doing so, or had done anything to induce] a belief in his mind that they had no objection to the putting up of the structures. The petitioner's own witness, Shri Amar Nath DW. 1, the manager of M/S. Darbari Lal Vasu Dev, the original proprietor of the site in dispute, stated that he had warned the petitioner to construct the Dhara on his own land. Despite this warning, the petitioner did not get the land, purchased by him, demarcated, before putting up structures as should have been done, by a reasonable, prudent man-There was some delay in instituting the suit by the respondent. But mere delay, without anything more, does not amount to waiver or acquiescence and is not a sufficient ground for depriving the respondent of her right to get possession. Similarly, the mere probability that the petitioner would suffer more, if demolition of the structures was ordered, than the respondent, in case, she were awarded pecuniary compensation, cannot be regarded as a just ground for refusing the relief of possession to her. As there were no special circumstances, depriving the respondent of her right to get possession, she was entitled to get possession of the portion, in dispute, after removal of the structures. The award of compensation was not a proper and just redress. The learned District Judge, therefore, did not err in granting the decree for possession after the removal of the structures. Moreover, as has been laid down in *Lalla Ram v. Naresh Chand*, AIR 1952 Him Pra 28, the arriving at a conclusion or decision is a

mental operation and the Court cannot be said to be acting in so coming to a decision on a question of law or of fact and so far as the arriving at a conclusion or decision is concerned, whether the lower appellate Court decides the questions rightly or wrongly it has jurisdiction to do so, and even if it decides wrongly, it cannot be said to have acted with material irregularity in the exercise of its jurisdiction.

12. No other point was urged in the revision-petition, which fails and is dismissed with costs.

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