Devki Nand Vs. Jai Kishan

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Court : Himachal Pradesh

Decided On : Aug-24-2007

Reported in : 2007(3)ShimLC262

Judge : Kuldip Singh, J.

Appellant : Devki Nand

Respondent : Jai Kishan

Disposition : Appeal allowed

Judgement :

Kuldip Singh, J.

1. This appeal is against the judgment dated 7.7.2001 passed by learned District Judge, Kinnaur Civil Division at Rampur Bushahr in Civil Appeal No. 8 of 2001.

2. The brief facts are that Jai Kishan plaintiff filed a suit for permanent prohibitory injunction against Devki Nand defendant, restraining him from interfering in any manner in the use of path by plaintiff which passes through khasra Nos. 17, 49/1, 50/1 and 51/1. The suit was contested by defendant and was dismissed by learned Sub Judge 1st Class Rampur Bushahr on 14.3.2001. The plaintiff filed an appeal against judgment, decree dated 14.3.2001 and in the appeal plaintiff filed an application under Order 6 Rule 17 read with Section 151 CPC for amendment

of plaint. The plaintiff wanted to plead more facts in para-1 of the plaint and he wanted to add paras 1-A and 2-A also in the plaint. This application was opposed by defendant. The learned District Judge allowed the amendment application on 7.7.2001 and remanded the suit to the trial Court for disposal in accordance with law. The defendant is in appeal in this Court against judgment dated 7.7.2001.

3. The learned Counsel for the appellant has submitted that after conclusion of the arguments the amendment application was filed before the lower Appellate Court and therefore, the application was not maintainable. He has submitted that the lower Appellate Court has ordered open remand without recording a finding whether additional issues emerge from the amendment or further evidence is required after amendment. In alternative he has submitted that at the most the District Judge should have given clear direction to the trial Court regarding framing of fresh issues or recording of further evidence, if so required. The District Judge has ordered retrial without considering the case whether any further evidence is required in the case or not. The learned Counsel for the respondent-plaintiff has supported the impugned judgment.

4. The plaintiff filed the suit for permanent prohibitory injunction on the ground that he is owner in possession of land comprised in khasra Nos. 16 to 23, situated in mouza Khatkar, Tehsil Kumarsain, District Shimla. On khasra Nos. 18 to 21, the plaintiff has his house, compound, water tank and there is a passage from khasra Nos. 17, 49/1, 50/1 and 51/1 which is used by plaintiff and his family for ingress and egress to his house for the last 35 years continuously without any interruption, as a matter of right and an easement. The defendant has no legal right to cause obstruction or destroy the path in any way.

5. The plaintiff to make his pleas more explanatory proposed amendment in para-1 of the plaint and additions of paras 1-A and 2-A in the plaint. In para 2-A, he wanted to add in alternative plea of easement by way of necessity also.

6. The arguments in appeal were heard by the learned appellate Court on 31.5.2001 and the case was fixed for orders on 12.6.2001. The appeal was taken up on 8.6.2001 as the appellant-plaintiff filed an application under Order 6 Rule 17 read with Section 151 CPC, thereafter reply to the amendment application was

called and on 6.7.2001 arguments in appeal along with amendment application were heard and on 7.7.2001 the impugned judgment was passed allowing the amendment application and remanding the case to the trial Court. The learned Counsel for appellant/defendant has submitted that after conclusion of arguments in the appeal the amendment application was not maintainable and he has relied on 2000 (1) S.L.J. 404 in Smt. Savitri Devi and Ors. v. Gauri Dutt case. In Smt. Savitri Devi case appeal was not reheard along with amendment application and therefore this Court has held that application for amendment was not maintainable after conclusion of arguments. In the present case facts are different.

7. The amendment application was filed on 8.6.2001 when arguments in appeal were already heard on 31.5.2001 but the appeal was reheard along with the amendment application on 6.7.2001. Therefore, Smt. Savitri Devi and others case (supra) is not applicable. The hearing of appeal and amendment application on 6.7.2001 has not caused any prejudice to the respondent-defendant. The Court has jurisdiction to rehear the appeal, if so required, therefore, no fault can be found with the consideration of amendment application along with hearing of appeal by lower appellate Court on 6.7.2001 and, the contention of learned Counsel for the appellant-defendant that application was wrongly considered by the lower appellate Court after hearing of the arguments is rejected.

8. The suit was filed on 28.4.1999 and application for amendment of the plaint was filed in the lower appellate Court on 8.6.2001. The lower appellate Court had the jurisdiction to consider the amendment application. On the basis of material on record and in the facts and circumstances of the case the District Judge has rightly allowed the application for amendment of plaint.

9. The District Judge, however, has recorded a finding that amendment in no way has changed the nature of the suit. The amendment applied for was nothing but additional approach to the same facts. In other words as per District Judge, no new plea has been taken by way of amendment by plaintiff. The District Judge has not recorded a finding that new issues emerge from amendment of plaint. There is no finding that amendment of the plaint requires further evidence.

10. The District Judge without recording specific reasons for retrial of the suit has remanded the suit after accepting the appeal. The minimum required from the lower appellate Court was to consider and record a finding whether new issues emerge after amendment and whether further evidence is required in view of the amendment. In absence of such finding, reasons, the District Judge has erred in remanding the suit for retrial.to the trial Court. The mere reproduction of statutory provision by District Judge in remand order that 'retrial' is necessary is not sufficient for ordering open remand. The basis and reasons for retrial are to be recorded in the judgment of remand. Therefore, while upholding the impugned judgment to the extent allowing amendment application, the remaining judgment dated 7.7.2001 remanding the case to trial Court is set aside with a direction to the District Judge to decide the appeal afresh, however, if he comes to the conclusion that further evidence is required in view of the amendment of the plaint, then he may either record the evidence himself or through the trial Court. It is however, made clear that District Judge shall decide the appeal himself in accordance with law.

11. The result of above discussion, the appeal is allowed. Judgment dated 7.7.2001 is set aside with a direction to the District Judge to decide the appeal himself and in case he comes to the conclusion that further evidence is necessary for deciding the appeal in view of amendment then he shall record the evidence himself or through the trial Court but District Judge shall ultimately decide the appeal. No order as to costs.

12. The parties through their Counsel are directed to appear before the lower Appellate Court on 17.9.2007. The Registry is directed to transmit the records of the case of Courts below to lower appellate Court immediately so as to reach there before the date fixed.