

Abdul Ahad Dar Vs. Rasool Dar and ors.

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Court : Jammu and Kashmir

Decided On : May-30-2007

Reported in : 2007(2)JKJ282

Judge : Mansoor Ahmad Mir, J.

Appellant : Abdul Ahad Dar

Respondent : Rasool Dar and ors.

Disposition : Appeal dismissed

Judgement :

Mansoor Ahmad Mir, J.

1. Challenge in this Civil Second Appeal is to the judgment and decree dated 9th October, 2004 delivered by District Judge, Budgam, in Civil First Appeal titled Ahad Dar v. Rasool Dar and Ors. and also to the order dated 3rd September, 2005 passed in review petition.

2. Plaintiffs-Karim Dar and Rasool Dar sons of Gaffar Dar filed a civil suit for declaration and permanent injunction in respect of suit property comprising of land measuring 14 kanals 13 marlas situated at Humhama Tehsil and District Budgam on the grounds Gaffar Dar died leaving behind three sons i.e. plaintiffs and one Mohammad Dar. Mohammad Dar had died issueless and his share was inherited

by Mst. Jani his widow who too died and that share reverted to the plaintiffs. Plaintiffs are thus only heirs/successors of Gaffar Dar. The defendants-appellant and respondents 7 to 17 herein have no right, title or claim over the suit property but are without any rhyme or reason interfering into their possession.

3. Defendant resisted the suit on the following grounds;

Ahad Dar-defendant No. 1 - appellant is the adopted son (pizr parwardah) of deceased Mohammad Dar S/O Gaffar Dar;

Mohammad Dar had bequeathed the entire property in favour of Ahad Dar by virtue of written will deed allegedly executed on 30th March, 1956; and

He had gifted away entire property in terms of the gift deed executed on 11th February, 1962 registered on 21st February, 1962 in favour of Ahad Dar.

4. Following issues came to be framed by the trial court:

1. Whether the plaintiffs are entitled to inherit the suit land left by Mohd. Dar? OPP
2. Whether defendants are interfering into the possession of the plaintiff unnecessarily? OPP
3. Whether suit in the present form is not maintainable? OPD
4. Whether the suit is hit by principal of 'Resjudicata' and estoppel, and their effect on the suit? OPD
5. Whether the suit is not triable in view of the provisions of Agrarian Reform Act? OPD
6. Whether the suit is not maintainable for non-joinder of necessary parties? OPD
7. Whether the suit is time barred? OPD
8. Whether the plaintiff have given incorrect pre-decree table, if so what is correct table? OPD

9. Whether defendant No. 1 is the adopted son of Mohd Dar brother of plaintiffs and is entitled to inherit the property of deceased Mohd Dar in view of the custom? OPD

10. Whether suit land had been transferred to defendant No. 1 by Mohd Dar by execution of will deed dated 20.03.1956 and Gift Deed dated 11.02.1962 attested on 21.02.1962? OPD

11. Whether valuation of the suit has been wrongly fixed and deficit court fee has been paid? OPD

12. Relief?

5. It is apt to mention herein that during the pendency of the lis Karim Dar-plaintiff No. 1 passed away and his legal heirs came to be brought on record by the trial court vide order dated 7th July, 2001.

6. Trial Court after scanning the evidence held that defendant No. 1-appellant had failed to prove and establish his status as adopted son (Pisar Parwardah) and his claim as owner.

7. Feeling aggrieved the appellant Ahad Dar preferred Civil First Appeal before the Principal District Judge, Budgam, and assailed the judgment and decree of the trial court on the grounds taken in that appeal. Appellate court dismissed the appeal in terms of an elaborate judgment dated 9th April, 2004 and upheld the judgment of the trial court.

8. In this Civil Second Appeal, this Court vide order dated 15th October, 2005 framed substantial questions of law. It is profitable to reproduce order dated 15.10.2005 herein, which reads as under:

Heard.

The following substantial questions of law have been arisen for determination:

a. Whether a decree for perpetual injunction can be granted to protect the possession of a plaintiff over a suit property, when he is not in its possession?

b. whether a decree for declaration can be passed in respect of land in favour of the plaintiff when the appellant/defendant was recorded as owner of such land on the basis of registered gift deed of 1962 and such entry had remained unchallenged for the last three decades?

c. whether a second suit for declaration and perpetual injunction is competent, when suit filed earlier between the same parties has been dismissed by the court in default

Admit. Issue notice. Call for the relevant record.

Notice in CMP also for objections. Till objections are filed, the judgment and orders on challenge shall remain in abeyance.

9. Learned Counsel for the appellant argued that Ahad Dar- appellant was adopted son of deceased Mohammad Dar and succeeded as pirs Parwardah. Further he argued that appellant was the absolute owner of the property because deceased Mohammad Dar had bequeathed the property in his favour in terms of the will deed and also Mohammad Dar had subsequently gifted away the entire property in favour of Ahad Dar.

10. Whether Ahad Dar is a 'Tirs Parwardah' is a question of fact. It was to be proved by the appellant which he had failed to prove. It is apt to mention herein that appellant had not produced any adoption deed not to speak of proof of the said deed before the trial court or even before the appellate court. He had also failed to produce and prove the so called will deed and gift deed. All the questions projected by the learned Counsel for the appellant in the appeal or during the course of arguments are questions of fact cannot be a ground for filing a second appeal.

11. Second appeal can be filed only when substantial question(s) of law is/are involved. Right of second appeal is neither natural nor inherent but it is a statutory right and it is to be regulated in accordance with the law and in accordance with the mandate of Section 100 of Civil Procedure Code. The finding of fact cannot be interfered with in second appeal. The second appeal is to be heard only on

substantial questions of law. The purpose and rationale behind the provisions of Section 100 of Civil Procedure Code is that there must be some finality and certainty.

12. Apex Court has laid down how to entertain second appeal in case titled Gurdev Kaur v. Kaki reported in AIR 2006 SCW 2404. It is profitable to reproduce paras-68,69 and 70 herein:

68. The analysis of cases decided by the Privy Council and this Court prior to 1976 clearly indicated the scope of interference under Section 100, CP.C. by this Court. Even prior to amendment, the consistent position has been that the Courts should not interfere with the concurrent finding of facts.

69. Now, after 1976 Amendment, the scope of Section 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering under Section 100 C.P.C. only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as 'substantial question of law' which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become 'third trial on facts' or 'one more dice in the gamble'. The effect of the amendment mainly, according to the amended section, was:

(i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved.

(ii) The substantial question of law to precisely state such question;

(iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;

(iv) Another part of the Section is that the appeal shall be heard only on that question.

70. The fact that, in a series of cases, this Court was compelled to interfere was because the true legislative intendment and scope of Section 100 C.P.C. have neither been appreciated nor applied. A class of judges while administering law honestly believe that, if they are satisfied that, in any second appeal brought before them evidence has been grossly mis-appreciated either by the lower appellate court or by both the courts below, it is their duty to interfere, because they seem to feel that a decree following upon a gross mis-appreciation of evidence involves injustice and it is the duty of the High Court to redress such injustice. We would like to reiterate that the justice has to be administered in accordance with him.

13. Applying the test to the instant case, the grounds taken in the memo of appeal and projected by learned Counsel for appellant are questions of fact and both the courts i.e. trial court and first appellate court after scanning evidence have returned findings. This second appeal is aimed at to disturb the concurrent findings of fact which is beyond the scope of second appeal. I am of the considered view that no substantial question of law is involved in this appeal. I am also of the considered view that this Court has not virtually framed any substantial question of law. However, be it as it is, questions (a) to (c) are all questions of facts. Whether plaintiffs are in possession is a question of fact, whether there is any gift deed in favour of the appellant that too is a question of fact and was subject matter of one of the issues. Question (c) was subject matter of one of the issues bearing No. 4 and defendants have failed to prove all the issues. Thus no substantial question of law is involved in the present appeal.

14. In view of the above facts and circumstances the appeal merits to be dismissed. It is apt to mention herein that the appellant had filed a review petition but the review petition also came to be dismissed.

Viewed thus, the appeal is dismissed and the judgment and decree dated 9th October, 2004 as also the order dated 03.09.2005 are upheld.

